



INTERNATIONAL  
HELLENIC  
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# **MEDIATION AND NEGOTIATIONS ON ART- RELATED DISPUTES:**

## **With special focus on Advisory Panels for Nazi-looted Art**

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

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## **Abstract**

This dissertation is written as a part of the MA in Art Law and Arts management at the International Hellenic University.

Mediation and negotiations on the field of art related disputes are turning into a trend and have contributed to the resolution of cases that would be still pending, or dismissed. The same applies for the spoliation panels, when referring to cultural property disputes derived from the Second World War. Due to the fact that those methods are newborn, research is not common. The main points that this paper may add to current literature are mentioned below. A pattern can be spotted, dictating that the establishment of soft law principles strengthens the abovementioned methods of resolution and favors their extent use. In addition, despite the fact that those methods of resolution are found in the shadow of law, they are not independent from it.

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## **I. Introduction**

This paper examines the role of negotiations and mediation in art related disputes. The scope of the examination will focus on the factors that contributed to their development. Secondly it will define the obstacles regarding their application and, finally, the components of their current nature. In particular, the purpose of the study is to evaluate the relation between litigation on one hand and negotiations and mediation on the other. In addition, another critical issue on this analysis is the examination of the Intergovernmental committee for promoting the return of Cultural property (ICPRCP) and the mediation offered by WIPO-ICOM. The resolution of Nazi looted art through those alternative means of dispute resolution will also come under scrutiny, while focal point of the study, are the cultural property disputes. Last but not least, the analysis will also be approached by case studies.

## **II. Aspects of inadequacy of Litigation in resolving cultural property disputes**

The blooming of the alternative dispute resolution methods, such as negotiation and mediation is mainly the result of the failure of litigation to fulfill needs of the parties that other means are capable of satisfying. In this chapter, the factors that render the resort to courts an “ultimum refugium” for art related disputes will be analyzed.

## **II.1. Matters of jurisdiction and applicable law**

Cultural property disputes are -to a great extent- matters of international nature and occasionally the international treaties that those disputes fall under, are hindered due to the inability to be applied in domestic courts. The procedural law ,through which, the claimant should file the suit under the international law treaty ,differs from state to state and it is evident that it can also effect the substantial law, such as matters of proof and the issuance of provisional measures.<sup>1</sup> Moreover, the Brussels Regulation<sup>2</sup> as well as the Lugano convention<sup>3</sup> envisage that as a principle the decision on the matter of jurisdiction burdens the domicile of the defendant. This practice does not contribute to the simplification of the proceedings of claims regarding cultural objects since illicit trafficking is compound to international trading and looted art is transferred through transit countries and is being exchanged across various destinations by the time the claimant files the suit. The given place of the artefact may not actually coincide with its location by the time the claimant takes legal action.

Filing in states within the European Union or the European Free Trade Association<sup>4</sup> facilitates the procedure of international litigation, however, this is seldom the case. Countries or regions which due to the free ports, have a major role in the illicit trafficking of cultural goods, may not belong to the European Union (such as Shanghai) and thus, initiating litigation proceedings is impeded. In France for instance, the applicable law is the one on which the litigation takes place, whereas the law in the United States of America the applicable law is the one in force at the place of the location of the objects since the last transaction<sup>5</sup>. Thus, it is not seldom the fact

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<sup>1</sup> Bendetta, M. (2019). *The recovery of cultural property in international law: collaborative settlements of disputes* (p.57) Master's thesis, Luiss Guido Carli. Luiss Thesis Biblioteca. Last visited (13/1/2021) <https://tesi.luiss.it/id/eprint/25133>

<sup>2</sup> *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*

<sup>3</sup> *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.*

<sup>4</sup> Renold ,M.A. (2016). *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations*, (p.25). Last visited (13/1/2021) [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU%282016%29556947](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282016%29556947)

<sup>5</sup> Blake, J. E. (2015). *International cultural heritage law* ,(p.52) 1st ed., Ser. 1.NY:USA. Oxford University Press

that a court may not apply the domestic law rendering the ruling an unpredictable outcome and consequently a risk for both of the parties.

## **II.2. Cost of the proceedings**

Another aspect that needs to be noticed is the fact that litigation proceedings and especially those proceedings that fall under international law are expensive procedures and is often the case that private individuals do not have the economic resources to cope with the expenses<sup>6</sup>. This also applies to countries with important cultural wealth that do not possess the economic wealth of the western states, and are harmed by the illicit trafficking of cultural objects from their territory, especially with reference to artefacts that had been looted during the colonization period.

## **II.3. Statutes of limitation**

In addition, statutes of limitation contribute to the rising of mediation and negotiations in resolving disputes where art is involved. The violation of the law (domestic or international) may have a long time distance with the filing of the suit and thus the unlawful act is protected either by the statutes of limitations or laches. Typical example of this fact is the case regarding Chagall Gouache between Solomon R. Guggenheim Foundation and Lubel. A Gouache painting by Marc Chagall was stolen from the Solomon Guggenheim museum between 1960 and 1967<sup>7</sup>. After many transactions the artwork ended at the possession of Mrs Lubel. Resorting to courts demanding restitution the Guggenheim Museum in 1990 turned to the Appellate Division, since the court had dismissed the case in 1987 based on the statute of limitation. The Appellate court did not affirm the decision of the court and rejected the dismissal on the grounds of statute of limitation and demanded on behalf of Mrs. Lubel a showing of resulting prejudice<sup>8</sup> and the suit was transferred to the trial court.

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<sup>6</sup> Stamatoudi, I. (2011), *Cultural Property Law and Restitution A Commentary to International Conventions and European Union Law*, (p.190). Cheltenham, UK: Edward Elgar

<sup>7</sup> Perez-Pena, R. (1993) *Guggenheim Presses Case on a Stolen Painting*. Last visited (13/1/2021) <https://www.nytimes.com/1993/12/27/nyregion/guggenheim-presses-case-on-a-stolen-painting.html>

<sup>8</sup> Wallace A., Chechi A., Renold M.A. (2013), *Case Chagall Gouache – Solomon R. Guggenheim Foundation and Lubell*. ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/case-chagall-gouache-2013-solomon-r-guggenheim-foundation-and-lubell>

At the beginning of the trial, the two sides announced settlement that included the maintenance of the artefact to the possession of Mrs. Lubel, although a reparation had to be made to the museum in the amount of the estimated value of the artwork.

This case is an illustrative example that laches and statutes of limitation, even if they do not dismiss totally a case, they provoke implications unbearable in the matters of cost and time. Consequently, the emerge of alternative dispute resolution methods are an appropriate solution for those matters.

#### **II.4. The Nature of litigation**

Furthermore, litigation as a process is by definition very rigid and the ruling is a win-lose situation. Delving deeper into this fact, it becomes self-evident that a court fails to detect common interests of the parties and resolution through an amicable approach, remaining, thus, intact the relations between the parties (an element of utmost importance in art trade) becomes almost impossible.<sup>9</sup>

Furthermore, state immunity is also an important issue regarding litigation of art dispute. A more thorough examination in matters of litigation concerning art related disputes discloses the inadequacy on behalf of the court to enforce the ruling made by it especially in international public and private law, since state immunity creates serious obstacles.<sup>10</sup>

#### **II.5. The factor of publicity**

Additionally, the rise of negotiations and mediation on art related disputes derives also from the confidentiality and the secrecy it provides, contrary to courts, where the judgment is being published and the court trial draws attention and in many circumstances the defendant is rendered infamous to the art world. Especially on matters of illicit trafficking of cultural goods, a trial can be devastating for the reputation of an institution. On top of that, an institution that agrees to mediation or negotiates a dispute of this nature carves the image of a figurative organization with strong moral principles.

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<sup>9</sup> Stamatoudi, I. (2011), *Cultural Property Law and Restitution A Commentary to International Conventions and European Union Law*, (p.191) (41(2)). Cheltenham, UK: Edward Elgar

<sup>10</sup> Chechi A. (2014), *The Settlement of International Cultural Heritage Disputes* (pp.124-125). Oxford University press



## **II.6. The burden of proof**

In court proceedings, evidence is a cornerstone and the lack of it leads to the avoidance of litigation. Especially when the case refers to illegal trafficking or looted artefacts, although there are some organizations such as the Interpol lost art database ,containing more than fifty thousand items<sup>11</sup> or the Art loss register which investigates the provenance<sup>12</sup> of an artefact for purposes of due diligence, in some occasions ,such as illicit excavations, it is impossible for a state to know the existence of an object that has not been discovered.

## **III. Negotiations as a method of resolution for art-related disputes**

In order for negotiations to be analyzed as a resolution process for art related disputes, it is necessary to present the framework of soft law, politics and international relations established, contributing to the development, shape and the effect on them.

### **III .1. The contribution of Soft Law**

In the world of art trade, soft law instruments (such as the ICOM code of Ethics and the international code of ethics, established by the ICPRCP) alter the environment of art transactions setting a framework towards the respect of law and more importantly of moral principles. In the view of the author they constitute elements, which favor the initiating of negotiations for disputes of cultural interest. The analysis below justifies the abovementioned assertion

#### **III.1.A. The ICOM code of Ethics**

The ICOM code of Ethics is established as an instrument of soft law, which includes principles of professionalism among museums and their staff. In 1986, the International Council of Museums made mandatory the acceptance of the code for its members in an effort for a wider acceptance and implementation of its principles. Although the code of Ethics is not legally binding, it is self-evident that the disrespect

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<sup>11</sup> *Stolen works of Art Database*. Interpol. Last visited (13/1/2021)

<https://www.interpol.int/en/How-we-work/Databases/Stolen-Works-of-Art-Database>

<sup>12</sup> Recover. Art Loss Register. Last visited (13/1/2021) <https://www.artloss.com/recover/>.

of it, leads to the isolation of the institution by the other members of the council, effecting eventually on the commercial power of the institution.

The ethical principles established by ICOM introduce the promotion of negotiations as a dispute resolution method ,since principle 6.2 regarding the return of cultural property states that “Museums should be prepared to initiate dialogue for the return of cultural property to a country or people of origin.”<sup>13</sup>, obliging the museums to act in good faith. Moreover, the Code of Ethics establishes the principle of open archives, facilitating the detection of dispute and thus the initiating of negotiations, in view of the fact that the inseparable connection between documentation and the spotting of a vague transaction is undoubtable

### **III.1.B.        The International code of Ethics**

Another soft law instrument that falls under the scope of the analysis is the International code of Ethics established by the Intergovernmental committee for promoting the return of Cultural property in 1999. This code, although it does not include a large amount of moral principle, it focuses on the fundamental moral obligations of the dealers of cultural property, such as the obligation of due diligence in order for illicit trade of art to be prevented. Although not explicitly stated ,it is self-evident in Article 1 ,which provides that “Professional traders in cultural property will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported.”<sup>14</sup> The wording “reasonable cause to believe” seems to be vague as to its definition and in order for a dealer of such artefacts to secure the safety of his or her transaction ,the full chain of provenance has to be investigated.

In addition Article 3 of the International Code of Ethics for Dealers in Cultural Property, mentions that “A trader who is in possession of the object, where that

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<sup>13</sup> International Council of Museums. (1986). *Code of ethics: ICOM code of ethics for museums*. (6.2.) Buenos Aires, Argentina: International Council of Museums. Last visited (13/1/2021) <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>

<sup>14</sup> UNESCO intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation ,(1999). *International Code of Ethics for Dealers in Cultural Property* (article 1). Last visited (13/1/2021) <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-international-code-of-ethics-for-dealers-in-cultural-property/>

country seeks its return within a reasonable period of time, will take all legally permissible steps to co-operate in the return of that object to the country of origin to cooperate in favor of the return or restitution of a cultural object”<sup>15</sup>. Given the fact that Article 8 of the code envisages the publication of the report of the body that will investigate the provenance and the suspicion of an illegal transaction possibly made by the dealer, using element of publicity as a leverage, it becomes clear that, although litigation is a “legally permissible step”, it constitutes a public procedure, and thus it cannot become the first step towards the resolution on behalf of the dealer. In contrast, negotiations fulfill the requirements of being the first step.

There was a strong need for this code, since shady transactions between dealers and cultural institutions were not rare and in some occasions, law failed to satisfy moral obligations. A characteristic example of the above assertion is the case with reference to Three Nok and Sokoto Sculpture between the state of France and that of Nigeria. The transaction for the acquisition on behalf of France of those pieces of African art, was executed through the intermediary role of a dealer. Despite the fact that the masterpieces were under export restrictions, and they were included in the ICOM Red List of African Archaeological Cultural Objects at Risk, the state of Nigeria granted permission for the export <sup>16</sup>. This transaction, received harsh critic by the media and the international legal community and a new settlement was ought to be made and it was made after all. The ownership of Nigeria on the works of art was acknowledged and in exchange a loan for France was agreed with time duration of twenty-five years<sup>17</sup>.

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<sup>15</sup> UNESCO intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation ,(1999). *International Code of Ethics for Dealers in Cultural Property* (article 3). Last visited (13/1/2021)

<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-international-code-of-ethics-for-dealers-in-cultural-property>

<sup>16</sup> Veliloglu,E, Bandle,A.L. Chechi,A Renold,M.A. *Case Three Nok and Sokoto Sculptures – Nigeria and France*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/case-chagall-gouache-2013-solomon-r-guggenheim-foundation-and-lubell>

<sup>17</sup> Veliloglu,E, Bandle,A.L. Chechi,A Renold,M.A. *Case Three Nok and Sokoto Sculptures – Nigeria and France*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/case-chagall-gouache-2013-solomon-r-guggenheim-foundation-and-lubell>

From this case, emerges the necessity of the International Code of Ethics for Dealers in Cultural Property, as it is clear that the abovementioned transaction, may constitute a legitimate action, since the state of Nigeria did not forbid it, nevertheless it does not follow the moral obligations and such activities may be prevented through argumentation based on the International Code of Ethics for Dealers in Cultural Property.

It would be incomplete to allege that the aforementioned instruments of soft law, only constitute influencers, sensitizing the public opinion. A more accurate approach, reveals that they form part of a two-way procedure of political inflows shaping those instruments and political outflows that are transmitted by them and it should be mentioned that without the sensitivity of the public opinion there would not exist a public outcry about the sale of the Nok and Sokoto Sculpture, leading to the settlement.

### **III.2. The influence of politics**

The environment of politics cannot be ignored by this paper, since state entities play a role both on art related disputes and on the international relations. The analysis below will explore the correlation that connects cultural property disputes and inter-state affairs

#### **III.2.A. The conflict of Cultural Nationalism and Cultural Internationalism in the light of power equilibrium**

The distinction between source nations and market nations, cannot be disconnected by the historic implications such as colonialism, war and the transition from the world of empires to the world of national states, which compile the current environment of international relations. The aforementioned shepherding can also be investigated in light of the power that every state possesses. United Kingdom, United States or Germany are market nations • a fact which is only allowed by their political and economic growth, whilst African States constitute –to a great extent- source nation.

Direct negotiations between states from opposite points of view (Cultural Nationalism-Cultural Internationalism), without the involvement of a third can be very intriguing as to the use of the leverage of each party.

### **III.2.B.        Leverages of the weaker parties**

It may seem that the wealthier states, or the institutions within their territory hold the upper hand in terms of negotiations regarding art related disputes, it has to be acknowledged, though, that the “source nations” can use strong leverages. To enhance on this argument, cultural sanctions are not rare on negotiations for art-related disputes and can urge parties to proceed to negotiations. An illustrative example of it, is the case between Italy and the J.P. Getty museum, in which Italy exerted pressure on the museum to negotiate the dispute in regards with Italian antiquities, by announcing a “cultural embargo” to the institution. The long term cooperation between them would be put on hold, jeopardizing the scheduled exhibitions of the museum, since there would not be allowed loans from Italy to the museum. The dispute was resolved a few days before the embargo, proving that such measures can be convincing.<sup>18</sup> This is not the only case where such measures have been used. The cultural wealth of a state and the pre-existing collaboration between the two negotiating parties, are conditions that come favorable for the position of the claiming state and unsettles the established equilibrium of bargaining power. The abovementioned case between Italy and the J.P. Getty museum is not the only practical implementation of this method. Between 1980 and 1990, according to the Egypt's antiquities department, five frescoes were stolen and the Louvre museum acquired them. Upon the request for the return of those cultural objects the French government claimed that the museum acted in good faith and the Egyptian state used as a bargaining tool the cultural embargo, claiming that it would be lifted only with the return of the artifacts. In fact, a plethora of conferences were suspended and the archaeological research conducted by the Louvre in Cairo ,was frozen, urging with this manner the French government to repatriate the Frescoes.<sup>19</sup>

### **III.2.C.        The effect of conflicting political systems**

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<sup>18</sup> Shehade M.,Fouseki K. (2016), *The Politics of Culture and the Culture of Politics: Examining the Role of Politics and Diplomacy in Cultural Property Disputes*(p.363). *International Journal of Cultural Property*, 23(4). Last visited (13/1/2021) doi:10.1017/S0940739116000308

<sup>19</sup> BBC. (2009). *France's Louvre museum returns five frescoes to Egypt*. BBC News. Last visited (13/1/2021) <http://news.bbc.co.uk/2/hi/europe/8412762.stm>.

Another factor that is possible to influence the negotiations for disputes regarding cultural objects, is the conflict of contradictory political and economic structures, usually derived from the period of the cold war. Distinctive example of this assertion is the case between the state of Cambodia and Sotheby's with reference to a Khmer Statue. There is a strong controversy as to the time, however the statue was illegally exported from Cambodia between 1972-1975 and ended at the possession of the auction house, which was about to bring it to auction in 2011. The statue was withdrawn in request of the Secretary General of the Cambodian National Commission for UNESCO<sup>20</sup>. The state of Cambodia, requested that United States facilitate the return of the artefact. This act, made by the state of Cambodia accelerated the procedures. The federal Government brought legal actions to the auction house, claiming that the one-thousand-year old masterpiece was illegally imported in the United States and in December it was agreed the return of the statue to Cambodia <sup>21</sup>

This analysis cannot ignore the political and historical facts of this case and in view of the author, they contribute to its development. The civil war of Cambodia, (part of the cold war) active during the time when the statue was stolen (the most likely hypothesis is that the illegal action occurred, before the Khmer Rouge regime rose into power) influenced the relations between United States of America and Cambodia (especially after the Vietnam – Cambodia war, when the United States was on the side of Cambodia in the United Nations General Assembly <sup>22</sup>) until the time of the dispute. The assistance of the United States in order for the Khmer statue to be repatriated, can be seen as a piece in light of the intention of good relations between those two states and it should be acknowledged the support of the United States of America to

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<sup>20</sup> Velioglu, E., Bandle, A.L., Chechi, A., Renold, M.A., *Case Khmer Statue – Cambodia and Sotheby's and the United States*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/khmer-statue-2013-cambodia-and-sotheby2019s-and-the-united-states>

<sup>21</sup> Mashberg, Blumenthal, R. (2013). *Disputed Statue to Be Returned to Cambodia*. *The New York Times*. Last visited (13/1/2021) <https://www.nytimes.com/2013/12/13/arts/design/disputed-statue-to-be-returned-to-cambodia.html>.

<sup>22</sup> Swann, W. (2009). *21st-century Cambodia: view and vision*. (p.99), Global Vision Publishing House.

Cambodia on the exceptional border-cultural dispute case of Prea Vihear in 1962<sup>23</sup> in order to be understood the fluctuations of this international relationship.

### **III.2.D.        The State Intervention**

The above case, discloses another aspect, which can exercise effect on the negotiation procedure regarding the disputes for cultural objects. The intervention of a state may exercise pressure, ending eventually to the repatriation of the cultural object (similar to the aforementioned and successful case is the one between the state of Peru and Yale University, which after the fail of negotiations, concluded to the return of the Machu Pichu collection, thanks to the involvement of the Democrat Senator Christopher Dodd <sup>24</sup>), nevertheless, it does not constitute a guarantee of success for the repatriation, especially in the circumstance that the objective conditions do not favor it. A distinctive example of a failure of an intervention of a state to accomplish restitution is the case between the state of Egypt and the St. Louis Art Museum. Discovered in 1952, the Mask of Ka-Nefer-Nefer was found missing in 1973, a period when the 1970 UNESCO convention was in its early stage and in a stage of getting ratifications. In 1999, the mask was purchased by the St Luis Art Museum and the request for the return was rejected in 2006.<sup>25</sup> The Federal state of United States of America filed a complaint in 2011, on the grounds that it was illegally imported in the United States, but it was dismissed due to lack of enough evidence. Negotiations were re-initiated, failed and the mask was never returned.<sup>26</sup>

This case discloses the importance of the documentation and the necessity of bringing evidence, strong enough, so that their use as leverage can alter the equilibrium of

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<sup>23</sup> Grabowsky, V. , Deth, S. (2018). *Heritage and Nationalism in the Preah Vihear Dispute Voices from Cambodia. Discourses on the Preah Vihear Conflict* (p.6). Last visited (13/1/2021) [https://www.academia.edu/8744802/Heritage\\_Nationalism\\_and\\_Discourses\\_on\\_the\\_Preah\\_Vihear\\_Dispute](https://www.academia.edu/8744802/Heritage_Nationalism_and_Discourses_on_the_Preah_Vihear_Dispute)

<sup>24</sup> Shehade M., Fouseki K. (2016), *The Politics of Culture and the Culture of Politics: Examining the Role of Politics and Diplomacy in Cultural Property Disputes* (pp.369-370). *International Journal of Cultural Property*, 23(4), 357-383.

<sup>25</sup> *Case Ka-Nefer-Nefer Mask*, case law database . Last visited (13/1/2021) [https://sherloc.unodc.org/cld/case-law-doc/traffickingculturalpropertycrimetype/usa/2014/case\\_ka-nefer-nefer\\_mask.html](https://sherloc.unodc.org/cld/case-law-doc/traffickingculturalpropertycrimetype/usa/2014/case_ka-nefer-nefer_mask.html)

<sup>26</sup> Bursey, L. , Velioglou, E. , Chechi A. , Renold M.A. (2015) , *Ka Nefer Nefer Mask – United States v. Mask of Ka Nefer Nefer*, ArtThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/ka-nefer-nefer-mask-2013-united-states-v-mask-of-ka-nefer-nefer>

power between the parties. It is also necessary to be mentioned the fact that the ignorance and disrespect of the principles established by the soft law, such as the one of good faith, should bring the sanctions (like the commercial isolation) developed in order those principles to be enforced

#### **IV. Mediation on art-related disputes**

Mediation, as part of alternative dispute resolution methods has received wide acceptance from the international community and in art related disputes seems to be turning into a trend. The 1995 Unidroit Convention on Stolen and Illegally Exported Cultural Objects promotes mediation for the resolution of cultural property disputes ,since article 8 (2) envisages that “The parties may agree to submit the dispute to any court or other competent authority or to arbitration”<sup>27</sup> whilst the 2015 Operational Guidelines of the 1970 UNESCO convention state that in case the negotiations, which is the first step for the resolution ,between the disputing parties cannot end to a settlement ,then the dispute “should be regulated by out of court resolution mechanisms, such as mediation”<sup>28</sup> and that the states may also use the Rules of Procedure of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP)

##### **IV.1. Closer look into the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation**

The ICPRCP, established in 1978, was targeting -according to its statute- to “seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin”,<sup>29</sup>. This applies to cases that the act of the dispossession of the cultural object occurred before the 1970 UNESCO convention

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<sup>27</sup> UNESCO (1998), *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, Rome , Italy. article 8(2)

<sup>28</sup> UNESCO (1970),*Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*,(paragraph 19) Paris,France

<sup>29</sup> UNESCO (1978), *Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation* (article 4),Paris,France



entered into force ,however the purpose of the Committee has been altered focusing to the combat against illicit trafficking of cultural objects.<sup>30</sup> The above assertion is confirmed by the mediation and conciliation procedure of the ICPRCP and the prerequisite for a case to be brought before it .The ““fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO”<sup>31</sup> can be found in almost every object in dispute and thus, the qualification is not hard to be accomplished. The nature of it, namely its function as an advisory tool for the parties in dispute, and the lack of jurisdictional competence and direct involvement of it in a case removes from it the dynamic that needs to be detected in a committee of this importance and is evident that the source of its inadequacy is found in its birth. The small number of cases (eight in total) resolved by the ICPRCP, affirms the abovementioned allegation.

The lenient character of the committee, namely, the non-binding nature of the mediation and conciliation proceeding unless “they reach a binding agreement on it”<sup>32</sup>,the strict following of those procedures and the dependence of the committee on the goodwill of each state ,since there is no obligation for the parties to proceed to mediation <sup>33</sup>,may favor the flexibility of the procedures, however this fact contributes to their inefficiency.

The manner of the establishment of this committee, discloses a general issue of the function of the U.N., that derives more from the established balance of power, and less, from the naivety of the organization. The states in a less favorable economic and consequently with a smaller political influence within the U.N are unable of exerting pressure through the ICPRCP and its statute, due to its aforementioned mild nature, deteriorate with this manner those matters, instead of balancing them.

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<sup>30</sup> Chechi A. (2014), *The Settlement of International Cultural Heritage Disputes* (pp.103-104). Oxford University press

<sup>31</sup> UNESCO (1978), *Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation* (article 3.(2)),Paris

<sup>32</sup> UNESCO, (2010),*rules of procedure for mediation and conciliation in accordance with article 4, paragraph 1, of the statutes of the intergovernmental committee for promoting the return of cultural property to its countries of origin or its restitution in case of illicit appropriation* ,article 10(4),Paris, France

<sup>33</sup> UNESCO, (2010),*rules of procedure for mediation and conciliation in accordance with article 4, paragraph 1, of the statutes of the intergovernmental committee for promoting the return of cultural property to its countries of origin or its restitution in case of illicit appropriation* ,article 3(1),Paris, France

Moreover, The exclusion of private and public institutions to be involved directly in a mediation proceeding ,since the rules and procedures envisage that “States may represent the interests of public or private institutions located in their territory or the interests of their nationals”<sup>34</sup>,complicates the possibility of mediating the dispute and therefore ,a settlement is even harder to be achieved.

The assertion mentioned above is ascertained, investigating the core of the mediation as a resolution method. Mediation is targeting at spotting the common interests of the parties in dispute, in view of resolving it in a mutually accepted and amicable manner. This is impeded with the intervention of an intermediary. The representation of a public or private institution through the state in which it is located alters the demands and interests of them and common grounds are hard to be identified. Especially in cases, in which both parties are institutions, a four stage procedure is being created. On one hand, a demand and interest has to be forwarded from the institution to the state and on the other hand the same demand is being transmitted from the other state, to the other institution.

Furthermore, the inappropriateness of states as representatives of public and private cultural institutions for mediating cultural property disputes through the ICPRC can be interpreted on another basis. Cultural institutions are entwined with statutes that cannot be exceeded by States, or on demand by them. The most defining example and the confirmation of the abovementioned inadequacy is depicted on the wording of the British Museum regarding the Parthenon Marbles and the refusal to the offer of the UNESCO to mediate the dispute. “The British Museum has a long history of collaboration with UNESCO and admires and supports its work. However, the British Museum is not a government body. The Trustees have a legal and moral responsibility to preserve and maintain all the collections in their care and to make them accessible to world audiences”<sup>35</sup>. Although a public institution, the British Museum acts on its own statutes and rules, the most important of which is the obligation of the Trustees to

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<sup>34</sup> UNESCO, (2010),*rules of procedure for mediation and conciliation in accordance with article 4, paragraph 1, of the statutes of the intergovernmental committee for promoting the return of cultural property to its countries of origin or its restitution in case of illicit appropriation*, article 4(2),Paris,France

<sup>35</sup> *The position of the Trustees of the British Museum*.The British Museum. Last visited (13/1/2021) <https://www.britishmuseum.org/about-us/british-museum-story/objects-news/parthenon-sculptures/parthenon-sculptures-trustees>

preserve and maintain the integrity of the collection of the museum and cannot be altered even with the intervention of the State which is located. It becomes clear, thus, that the connection of State entities and cultural institutions on behalf of the ICPRCP is completely inexpedient.

One could argue that, the failure of the Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation lies in its stagnant position in a constantly altering environment. The petitions of this environment cannot be met through it and during the period in which the committee was established, it may have constituted a revolutionary and innovative action (the same applies in the 1970 UNESCO convention<sup>36</sup>), however the world of art has become more sensitive regarding matters of restitution and cultural property of “fundamental significance from the point of view of the spiritual values” of a nation. The same methods that would settle those matters forty three years ago ,cannot offer satisfaction to the demands of the modern moral principles that are dictated today in the world of art.

Although the above assertion may have a basis, a more thorough investigation on the matter discloses its partial collapse. To elaborate, the committee was established in 1978, for that time it constituted a revolutionary breakthrough and for the current moral principles is obsolete. The rules of procedure, though, were published in 2005 and the first steps towards a direction with strong moral policy for the cultural objects separated from the country of their origin, had already been surfaced and the same applies for the issues regarding the inability of litigation to act as the decisive game changer. The museums had already initiated the application of a more diligent process on the acquisition of artworks and antiquities and it is evident that the circumstances were favorable for a committee that would resolve the cases that were at the shadow of law. The ICPRCP had the potential to become this instrument, nevertheless the circumstances demanded a more invasive body and the rules of procedure made clear its diffidence and its intention to constitute an external observer that would serve as advisor with little intervention and small influence.

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<sup>36</sup> *Stamatoudi, I. (2009). Mediation and cultural diplomacy, Return of cultural objects: The Athens conference , Athens, 2009 UNESCO Publishing and Blackwell Publishing Ltd.*

As this analysis has mentioned earlier, at the “Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation” can be found the necessary prerequisites for an instrument to resolve with efficiency cases that cannot be heard by courts. However, modifications are considered critical for the accomplishment of this goal. Firstly, the representation of the public and private institutions, that are involved in the trade of art and antiquities, it is essential that is revoked. A non-intermediary representation of those bodies (such as museums, galleries etc.) would facilitate the mediator in order to assist the parties to settle a dispute and would wipe out any obstacles created by the statutes of those institutions. In addition, this alteration would oblige the parties to enter into mediation procedure under the pressure of the public opinion, even if the proposal for mediating the dispute, would not be mandatory.

On top of that, the leniency of the committee has to be revised. In the view of the author, the offer of the possibility for a mandatory mediation between the parties under particular circumstances would be beneficial. To enhance, the rejection of a proposal of the ICPRCP for a dispute to be resolved through mediation would be possible once. If a proposal is rejected for a second time, it would lead to inquiry by a body, established by the ICPRCP. The outcome of the inquiry would render the mediation either mandatory or optional (The decision would be made on the basis of principles and mainly on the basis of the ICOM code of Ethics). In case that the mediation offer is decided to be optional and is being rejected once more, the case would be dismissed permanently by the ICPRCP. If the declining state fails to comply even with the compulsory mediation, it would lose for once the presidency of the ICPRCP.

#### **IV.2. The ICOM-WIPO Art and Cultural Heritage Mediation**

Another instrument providing for mediation procedure that also acts as an advisory body for it is the ICOM-WIPO Art and Cultural Heritage Mediation, which was established in 2011<sup>37</sup>. This body is orientated towards resolutions (via mediation) regarding disputes that arise through the commercial aspect of art trade and the implications that may occur, such as insurances, intellectual property or loans. It has a

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<sup>37</sup> Chechi A. (2014), *The Settlement of International Cultural Heritage Disputes* (pp.103-104).Essay, Oxford University press

broader scope of application than the ICPRCP, since according to article 2(a) of its rules “The scope of the mediation procedure is intended to cover disputes relating to art and cultural heritage, including but not limited to return and restitution, loan and deposit, acquisition, and intellectual property, and involving public or private parties including but not limited to States, museums, indigenous communities, and individuals.” The role of the mediator provided by the ICOM and WIPO is to promote any means that would facilitate the resolution, however he/she is unable of “imposing a settlement on the parties”<sup>38</sup>. Instead, the mediator in view of the failure of resolution of the dispute through mediation may propose alternative resolution methods, such as expert determination or arbitration<sup>39</sup>.

An element that constitutes a breakthrough regarding the ICOM-WIPO mediation is that soft law outweighs in the proceedings. This fact is made clear on article 13 (a), which envisages that “In the conduct of the mediation, the mediator and the parties shall bear in mind the ICOM Code of Ethics for Museums”<sup>40</sup>. One could argue that, since the ICOM Code of Ethics for Museums demands the acknowledgment of a plethora of international treaties, such as the UNIDROIT convention, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage or the UNESCO 1970 convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>41</sup>, the mediation procedure follows the international legislation. This assertion is confirmed, although not in total. The mediator, bearing in mind the ICOM code of Ethics, follows the moral principles established by it, facilitating the resolution and is less likely to acknowledge the legal vacuums, created by the treaties, such as the non-retroactive nature of them or the absence of enough evidence. Elements, namely, that would provoke the dismissal of a case in a court. It is necessary to mention that prior research discloses that domestic

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<sup>38</sup> ICOM-WIPO(2011) *Mediation Rules* (article 16). Last visited (13/1/2021)

<https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/>

<sup>39</sup> ICOM-WIPO(2011) *Mediation Rules* (article 16(b)). Last visited (13/1/2021)

<https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/>

<sup>40</sup> ICOM-WIPO(2011) *Mediation Rules* (article 13(a)). Last visited (13/1/2021)

<https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules>

<sup>41</sup> International Council of Museums. (1986). *Code of ethics: ICOM code of ethics for museums*. (7.2.) Buenos Aires, Argentina: International Council of Museums. Last visited (13/1/2021) <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>

law of one of the parties or international law, private or public, may be taken into consideration by the mediator under the consent of both of the parties.<sup>42</sup>

The aforementioned outweigh is a critical element for the study. At first, it establishes a form of dispute resolution that unlike the standard procedures, offered by private mediators or other institutions that provide for mediation regarding art related disputes, such as ArtResolve, it is based on common grounds for all of the parties, in which legislation functions as auxiliary and secondary and the moral principles cannot be considered as grey zones. Secondly, it reaffirms and strengthens the ICOM code of the ethics, in its practical implementation, in view of the fact that, its violation which leads to the resort to mediation (in most of the circumstances, under the burden of bad publicity) urges one of the parties to act in good faith (since the mediator acknowledges the ICOM Code of Ethics). An element that is considered crucial under the ICOM-WIPO Mediation Rules<sup>43</sup>

The most significant article regarding the rules of the ICOM-WIPO mediation is Article 31, which provides for the suspension of the statutes of limitation “in relation to the dispute that is the subject of the mediation from the date of the commencement of the mediation until the date of the termination of the mediation.”<sup>44</sup> The incentives provided by this article refer to both parties. The suspension of time limitations regarding the case, which is subject to the ICOM-WIPO mediation, offers the opportunity to the parties, before or during court proceedings, to try and resolve the disputed matter in an amicable and most importantly, confidential manner. It is evident that the article 31 of the ICOM-WIPO mediation rules is transfusing a dependence on law, since the possibility of suspension of statute of limitation is counting on the applicable law. The German substantive law for instance provides for the suspension of the statute of limitations with the mutual agreement by the parties, until one of the parties refuses to continue the negotiations<sup>45</sup>. The Canadian law also provides for the statute of limitations to stop running until, “the date the claim is

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<sup>42</sup> Vadi, V.,Schneider, H. (2014). *Art, cultural heritage and the market: ethical and legal issues* (p.104) Springer.

<sup>43</sup> ICOM-WIPO(2011) *Mediation Rules* (article 13(b)). Last visited (13/1/2021)  
<https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules>

<sup>44</sup> ICOM-WIPO(2011) *Mediation Rules* (article 31). Last visited (13/1/2021)  
<https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules>

<sup>45</sup> Bürgerliches Gesetzbuch (BGB) § 203 Hemmung der Verjährung bei Verhandlungen.

resolved, or the date the attempted resolution process is terminated either the date a party terminates or withdraws from the agreement”<sup>46</sup>, while in the United Kingdom, there is no provision for suspension of time limitations with the resort to mediation<sup>47</sup>. It should be acknowledged by the analysis, though, that this rule ensures the potential for suspension of statutes of limitation through the mandatory acceptance of it explicitly by both parties. ( According to Article 31 “The parties agree that, to the extent permitted by the applicable law, the running of the limitation period under the Statute of Limitations or an equivalent law shall be suspended in relation to the dispute that is the subject of the mediation from the date of the commencement of the mediation until the date of the termination of the mediation. ...”<sup>48</sup> ).

## **V. The use of Mediation and Negotiations for the resolution of Nazi looted Art**

The rapine of the Jewish cultural property was compound to the “Final Solution” that targeted at the precipitation of the Jewish culture and the cultural property belonging to the Jews and a thorough analysis of the confiscated art scattered throughout Europe as a profit revenue mechanism on behalf of the Nazi regime, discloses a sum over twenty percent of the fine art of this period <sup>49</sup>. Prior research suggests that, despite the universal nature of the Nazi looting, the unification of the law with respect to the restitution of those artifacts had never been accomplished and the effect of the operations made on behalf of the international community towards this direction exercised infinitesimal influence and renders the inhomogeneity of law an unresolved issue.

### **V.1. The failure of hard law**

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<sup>46</sup> (2002), *Limitation act* section 11(1), Canada. Last visited (13/1/2021)

<https://www.ontario.ca/laws/statute/02l24>

<sup>47</sup> International Bar Association, (2007) .Mediation sub-committee on the uncitral model law on international commercial conciliation *Response No. 1* .

<sup>48</sup> ICOM-WIPO(2011) Mediation Rules (article 31). Last visited(13/1/2021)

<https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules>

<sup>49</sup> Birnkrant, M.J. (2019), *The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-looted Art*, (p.213) . Washington University school of law. Washington University Global Studies 18(1). Last visited (13/1/2021)

[https://openscholarship.wustl.edu/law\\_globalstudies/vol18/iss1/8](https://openscholarship.wustl.edu/law_globalstudies/vol18/iss1/8)

The international legal community alongside with significant organizations that pertain to the restitution of looted cultural property has rushed into resolution imminently. Even though the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control of 5 January 1943 (hereafter the London Declaration), constitutes an immediate response with reference to acts of looting and provided for annulment of any transaction executed on soil under the occupation of the Axis (The Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever) <sup>50</sup>its efficiency remains debatable, due to its non-bonding nature that reveals the diffidence of the members to establish strict and enforceable provisions <sup>51</sup>. In order for the analysis to be accurate, it is essential that is mentioned the intact maintenance of the applicable private law regarding the restitution of looted cultural assets, even after the “London Declaration” <sup>52</sup> as a significant factor leading to the dissatisfaction of the victims of Nazi plunder in terms of restitution.

The one-dimensional view of this multi-dimensional issue on behalf of the allies has created a legal vacuum. The inter-state cases could –up to a certain degree- be settled, but the private international law as it is stated on this paper remains totally uncovered. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 First Protocol Hague Convention) established some serious elements with reference to the development of law on this field. Firstly, targeting to the unification of law, the first protocol introduced the definition of the notion of cultural object <sup>53</sup>. The absence of retroactivity, however, abstracts the potential of this

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<sup>50</sup> 1943, *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control*, London. (13/1/2021) <https://history.state.gov/historicaldocuments/frus1943v01/d456>

<sup>51</sup> O'donnell, T. (2011). *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?* (p.60). *European Journal of International Law*, Last visited 22(1). (13/1/2021) <https://doi.org/10.1093/ejil/chr004>

<sup>52</sup> Renold, M.A. (2016). *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations*, (pp. 9-10). Directorate general for internal policies policy department c: citizens' rights and constitutional affairs. Last visited (13/1/2021) [https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU%282016%29556947](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282016%29556947)

<sup>53</sup> Second International Peace Conference, (1907). *Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, Hague. Last visited (13/1/2021) <https://ihl-databases.icrc.org/ihl/INTRO/195>



convention to resolve cases of Nazi looted art, but rather functions as a result of it and simultaneously as a deterrent for its repetition. Ancestor of this convention is the 1907 Hague convention, which criminalized the cultural looting in times of war and abolished the long time war tradition that dictated the legalization of the spoil and looting assets of the losing side. Despite the fact that this convention constitutes a legal instrument, active during the time of the Second World War, the absence of the notion of restitution to the victims or the institutionalization of those proceedings, renders it inapplicable. The avoidance of litigation as a dispute resolution mechanism for Nazi looted art cases and the consequent low rate of restitution <sup>54</sup>can be interpreted by the aforementioned.

## **V.2. The establishment of Soft Law principles**

Indispensable for this paper is considered a brief reference to the International Customary Law and the rules that are entwined to it. The study "Customary International Humanitarian Law"(CIHL) created by the International Committee of the Red Cross (ICRC) is composed of the main principles of the Customary Law and on this analysis ,the crucial points are those focused on the war. The rule 40B illustrates the prohibition by customary law of “Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people ”<sup>55</sup>, whilst rule 41 envisages that “The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory.”<sup>56</sup>. Although these rules were not unified as an active treaty law, widely acceptable, but this only occurred immediately after WWII, they depict the common sense of justice and proves that this was largely neglected or impossible to be implemented.

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<sup>54</sup> Lerner,E.R.(1998), *The nazi art theft problem and the role of the museum: a proposed solution to disputes over title*,(p.15), Journal of international law and politics. 31(15). Last visited (13/1/2021) <https://coupdefoudre.com/CurrentArticle/NaziLootedArt.pdf>

<sup>55</sup> International Committee of the Red Cross (ICRC), (2005).*Customary International Humanitarian Law* (Rule 40B) Volume I: Rules. Last visited (13/1/2021) <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

<sup>56</sup> International Committee of the Red Cross (ICRC), (2005).*Customary International Humanitarian Law* (Rule 41) Volume I: Rules. Last visited (13/1/2021) <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

The failure of hard law to exercise and establish its potential within the framework of restitution of those artefacts, emerges as invigorating factor for mediation and negotiations, if not as their starting points. The victims resorted to other options for accomplishing restitution, such as mediation and negotiations

In order for mediation and negotiations to be used in looted art disputes, there was a strong necessity for a framework that would constitute the basis, on which the restitution could be implemented. This basis was created in 1998, when forty-four nations signed the Washington Principles. The signatory states came to an agreement, that would regulate and assist the restitution of Nazi-looted art and cultural possessions, and despite the non-binding composition of the principles, its success derives from the acknowledgment of the law dissimilarity between every signatory state and its potential to be implemented within the particularities of each domestic law.<sup>57</sup>

The eleven principles introduced by the Washington Conference, were providing for total disclosure of significant archives that would regulate the restitution of looted art that had been confiscated by the Nazis during the WWII.<sup>58</sup> Another aspect of those principles worth mentioning, is the encouragement of the “pre-war owners and their heirs to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted”<sup>59</sup>. Regarding this paper, of paramount importance constitute principles 10 and 11. The establishment of commissions and other bodies, such as advisory panels,<sup>60</sup> in order to rectify the injustice induced by the Nazi plunder and fulfill the underlying demand to resituate the looted artefacts, bears

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<sup>57</sup> Pell, O.C. (1999) *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted during World War II*, (pp 22-26), 1999 Symposium Theft Of Art During World War H: Its Legal And Ethical Consequences, DePaul Journal of Art, Tech. & Intellectual Property, 10(1). Last visited (13/1/2021)

[https://via.library.depaul.edu/jatip/vol10/iss1/4/?utm\\_source=via.library.depaul.edu%2Fjatip%2Fvol10%2Fiss1%2F4&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://via.library.depaul.edu/jatip/vol10/iss1/4/?utm_source=via.library.depaul.edu%2Fjatip%2Fvol10%2Fiss1%2F4&utm_medium=PDF&utm_campaign=PDFCoverPages)

<sup>58</sup> Washington Conference On Holocaust-Era Assets (1998), *Washington Principles on Nazi-Confiscated Art* (principle 1). Last visited (13/1/2021)

<https://www.lootedartcommission.com/Washington-principles>

<sup>59</sup> Washington Conference On Holocaust-Era Assets (1998), *Washington Principles on Nazi-Confiscated Art* (principle 7). Last visited (13/1/2021)

<https://www.lootedartcommission.com/Washington-principles>

<sup>60</sup> Washington Conference On Holocaust-Era Assets (1998), *Washington Principles on Nazi-Confiscated Art* (principle 10). Last visited (13/1/2021)

<https://www.lootedartcommission.com/Washington-principles>

a fully-fledged renewed dispute resolution process, whereas the forwarding of the Alternative Dispute Resolution<sup>61</sup> ,is an intriguing element for the analysis .

The Washington Principles were reaffirmed<sup>62</sup> in 2009 at Terezin ,where forty-six states signed the Declaration on Holocaust Era assets and related issues adopted by the Prague conference. This declaration calls upon the states to resolve Nazi looted art cases on the facts and merits<sup>63</sup> and promotes the alternative dispute resolution as a mechanism, with emphasis on transparency for provenances ,namely the research ,documentation and identification of cultural assets looted during the Nazi era. This fact has contributed to the strengthening of Mediation and Negotiations as an alternative method for dispute resolution, as the multiplication of identified cultural assets, has brought more claimants and given the successive restitution of the pre 2009 cases, mediation and negotiation has flourished. Illustrative fact for this assertion constitutes the increase of number of cases resolved by the UK spoliation panel post-2009<sup>64</sup>, as well as the collaboration of the Panel with the network of European countries to increase cooperation on returning Nazi-looted art. This act, although it has occurred from the London Spoliation Conference in 2017, its origin is enclosed in the Terezin Declaration and the need for international cooperation for open archives.<sup>65</sup>

Although the advisory panels cannot be considered mediation by definition, their common grounds, such as the voluntary mutual acceptance for the resolution and the participation of a third party, blur the difference between Advisory Panels and power mediation<sup>66</sup> ,rendering the reference to them necessary for this paper.

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<sup>61</sup> *The Restitutions Committee's history in brief*. Restitutiecommissie.

[https://www.restitutiecommissie.nl/en/the\\_restitutions\\_committees\\_history\\_in\\_brief.html](https://www.restitutiecommissie.nl/en/the_restitutions_committees_history_in_brief.html).

<sup>62</sup> Demarsin, B. (2011). *Let's Not Talk about Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, (p.145) .Brooklyn Journal of International Law 37(1). Last visited (13/1/2021) <https://brooklynworks.brooklaw.edu/bjil/vol37/iss1/3/>

<sup>63</sup> Kreder, J. A., (2009). *The New Battleground of Museum Ethics and Holocaust Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?* (p. 39).Oregon Law Review,88 (1). <https://ssrn.com/abstract=1410802>

<sup>64</sup> *Government Bodies: Spoliation Advisory Panel*. Last visited (13/1/2021) <https://www.lootedart.com/MFEU4P88744>.

<sup>65</sup> Washington Conference On Holocaust-Era Assets (1998), *Washington Principles on Nazi-Confiscated Art* (principle 11). <https://www.lootedartcommission.com/Washington-principles>

<sup>66</sup> Kekeris N.I. (2013). *A study in Nazi looted art cases. Traditional and modern ways of restitution*. International Hellenic University. Master's Thesis. IHU Repository. Last visited (13/1/2021) <https://repository.ihu.edu.gr/xmlui/handle/11544/667>

### V.3. The Limbach Commission

The German Advisory (Limbach) Commission was formed in 2003, mainly, on the basis of the Washington Principles<sup>67</sup> and is specialized in the resolution of the disputes derived from the Nazi looting during the period 1933-1945. The potentiality of the commission covers private and public institutions, as well as private individuals and targets to resolve the dispute between the parties, in order to achieve an out-of-court amicable resolution.

This commission has received harsh criticism, due to its inability to resolve successfully a plethora of disputes that has been called to handle. An illustrative example regarding this assertion is the case between Flechtheim (a well-known Jewish collector) heirs and the museum of Düsseldorf<sup>68</sup>. Mr. Flechtheim was a notable art dealer with strong connections with many remarkable expressionist artists, such as George Grosz and Max Beckmann. The rise of Hitler into power, forced Flechtheim to flee from Germany (even his face was depicted for the Nazi hatred propaganda), leaving his Galleries to his former employees and eventually to a Nazi party member. His niece sold to a museum some paintings by Juan Gris in 1934 after Flechtheim left, with her being under prosecution. The painting surfaced in 1964 by the Düsseldorf museum, which purchased the painting. In 2014, the heirs and the Düsseldorf museum resorted to the German Advisory Commission for dispute resolution<sup>69</sup>. The agreement could not be accomplished, the representative of the Flechtheim heirs suspended the procedure with allegations that doubt the fairness of the proceedings. A plethora of academics and lawyers stress that the “Limbach” commission lacks of international

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<sup>67</sup> German Federal Government Commissioner for culture and Media. *Advisory Commission - German Lost Art Foundation*, [kulturgutverluste.de](http://kulturgutverluste.de) Last visited (13/1/2021) [https://www.kulturgutverluste.de/Web/EN/AdvisoryCommission/Index\\_alt.html](https://www.kulturgutverluste.de/Web/EN/AdvisoryCommission/Index_alt.html).

<sup>68</sup> Burris, D.S. (2016). *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, Von Saher and Their Progeny*, (pp 427-430), John Marshall Review of Intellectual Property Law 394 15(3). Last visited (13/1/2021) <https://repository.law.uic.edu/ripl/vol15/iss3/2/>

<sup>69</sup> O'Donnell N. (2016). *Flechtheim Heirs Suspend Limbach Commission Proceedings Over Juan Gris Painting in Düsseldorf*. Sullivan Worcester Blogs. Last visited (13/1/2021) <https://blog.sullivanlaw.com/artlawreport/flechtheim-heirs-suspend-limbach-commission-proceedings-over-juan-gris-painting-in-d%C3%BCsseldorf>.

support, while others question the structure of it leading to the will on behalf of the commission to be renewed.<sup>70</sup>

On the other hand, the “Limbach commission” has participated in fruitful resolutions. This allegation finds a basis on a defining case, which also provided for an intriguing element with respect to art law. In 2013 the commission was called to resolute a dispute between the Ludwig museum of Cologne and the heirs of the aforementioned art dealer, Mr. Flechtheim that pertained to the painting by Oskar Kokoschka “Portrait of Tilla Durieux”. The context of the case resembles the unsuccessful effort of resolution, mentioned above. The selling of the painting was considered to be forced and the restitution was ultimately accomplished <sup>71</sup>.The element that needs to be noticed in this case is that the burden of proof of forced sale bears upon the current possessor of the artefact, or in the wording of the ruling of the commission “In the absence of concrete evidence to the contrary it can be assumed that Alfred Flechtheim was forced to use the disputed painting due to his situation of persecution to give up.”<sup>72</sup> Although those reports do not create legal precedent and do not contribute to the development of law ,these words prove the total independence of the proceedings ,through the limbach commission, from the law and the orientation of it towards its own principles that can become dubious and controversial, since the fundamental right of the presumption of innocence is being disputed and consequently the aforementioned “secession” from the law needs to be reconsidered.

The number of cases (twelve, with a published recommendation for everyone), that the “Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially from Jewish possession”, as is its full name, reveals the profound issues that have occurred in its intrinsic procedures and, if anything,

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<sup>70</sup> Burris, D.S. (2016). *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, Von Saher and Their Progeny*,(pp 427-430), John Marshall Review of Intellectual Property Law 394 15(3). Last visited (13/1/2021)  
<https://repository.law.uic.edu/ripl/vol15/iss3/2/>

<sup>71</sup> Art Commissions: Advisory Commission on the return of cultural property seized as a result of Nazi persecution (Beratende Kommission),lootedart.com. Last visited (13/1/2021)  
<https://www.lootedart.com/MFEU4E88305>.

<sup>72</sup> Press and information office of the federal government of Germany(2013).*Press release Recommendation of the Advisory Commission for the return of cultural assets seized as a result of Nazi persecution*. Last visited (13/1/2021)  
[https://www.lootedart.com/web\\_images/pdf2/13-04-09%20BerKomm%20zu%20Flechtheim-Koln.pdf](https://www.lootedart.com/web_images/pdf2/13-04-09%20BerKomm%20zu%20Flechtheim-Koln.pdf)

discloses its insolvency and the consequent hesitancy on behalf of the claimants to rely on it. Beyond that, even if the commission has failed to accomplish a restitution in many cases, such as the Guelph treasure case between the Prussian Cultural Heritage Foundation, however, the analysis needs to mention that for the total number of cases, the recommendation was justified (regarding the Guelph treasure case, it was asserted that the selling was not forced).<sup>73</sup> This fact allows this analysis to denounce the rejection (that underlines its unfairness) of resolution through advisory panels in total, and to allege, instead, the successful function of other advisory panels in terms of Nazi looted art cases.

#### **V.4. The U.K. Advisory Panel**

The U.K. Advisory Spoliation Panel, established in 2000 targeting to the implementation of the Washington principles and functioning under the supervision of the Department of Culture, Media and Sports, has contributed to the resolution of Nazi looted art disputes by resolving 18 cases until 2014<sup>74</sup> and most of them with significant importance. One of them was the dispute between the heirs of Herbert Gutmann, an art collector and businessman who sold “The Coronation of the Virgin” by Peter Paul Rubens in 1934, and Samuel Courtauld Trust. The conclusion made by the panel was that “case is insufficient to warrant a recommendation that The Coronation of the Virgin should be transferred to them (The Gutmann heirs) or that an ex gratia payment should be made to them.”<sup>75</sup> Although the reports of the Panel are non-binding, the acceptance of the recommendation by the claimant leads to a subsequent acceptance of the final and permanent resolution of the case.

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<sup>73</sup> *Why was the Sale of the Guelph Treasure not a Forced Sale?* - Stiftung Preußischer Kulturbesitz. <https://www.preussischer-kulturbesitz.de/newsroom/dossiers-and-news/all-dossiers/dossier-the-guelph-treasure/why-was-the-sale-of-the-guelph-treasure-not-a-forced-sale.html?L=1>.

<sup>74</sup> Art Commissions: Advisory Commission on the return of cultural property seized as a result of Nazi persecution (Beratende Kommission). Last visited (13/1/2021) <https://www.lootedart.com/MFEU4E88305>.

<sup>75</sup> House of Commons (2010) *Report of the spoliation advisory panel in respect of an oil sketch by sir peter paul rubens, ‘the coronation of the virgin’, now in the possession of the samuel courtauld trust*, The stationery office, London. Last visited (13/1/2021) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/77981/7349\\_HC\\_655\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/77981/7349_HC_655_Accessible.pdf)

A case with intriguing significance was referred to the UK Advisory Spoliation Panel in 2004<sup>76</sup>, after a prior demand by the claimant, that was rejected<sup>77</sup>. It pertained to a Beneventan missal and the claimant was the Metropolitan Chapter of the Cathedral City of Benevento in Southern Italy against the British Library. According to the Panel, the Missal was looted during the Allied bombing of Benevento and after a variety of transactions, the final possessor became the British Library. The demand by the Archbishop of Benevento for restitution was rejected by the Library and in 2004 the chapter library resorted to the Spoliation Panel. The result of the report was the recommendation of the restitution of the Missal to the Benevento Cathedral. An element that triggers this paper to analyze is the matter of jurisdiction on this case. The looting of this manuscript was not conducted by the Nazi regime and yet it was under the jurisdiction of the Panel. This fact can be interpreted by the constitution and terms of reference regarding the panel, which states according to article 1 that “a Panel will be convened, to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object ("the object") during the Nazi era (1933-1945),”<sup>78</sup>. The wording of the terms of reference contains only a time shepherding (before and after 1933-1945 on the one side and during 1933-1945 on the other) in order for the cases to be qualified as appropriate jurisdictionally to be resolved by the Advisory Panel and not a quality one (looted by Nazis or not). Moreover, the report of this case by the panel bears another critical element. The first stage for the restitution was the loan of the missal on behalf of the Library to the Cathedral and the swift of the terms and condition made by the Board of the Library, in order to achieve the permanent restitution. The change, needful for the Board was that the Library should be able to reconstitute any item, provided that the Advisory recommends it, in contrast to the terms in force envisaging the prohibition of removal

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<sup>76</sup> Spoliation Advisory panel(2010) *Report of the Spoliation Advisory Panel in respect of a renewed claim by the Metropolitan Chapter of Benevento for the return of the Beneventan Missal now in the possession of the British Library*, The stationary office. Last visited (13/1/2021), London [https://www.lootedart.com/web\\_images/pdf/http\\_\\_\\_www.culture.gov.uk\\_publications\\_7412.pdf](https://www.lootedart.com/web_images/pdf/http___www.culture.gov.uk_publications_7412.pdf)

<sup>77</sup> Spoliation Advisory panel(2010) *Report of the Spoliation Advisory Panel in respect of a renewed claim by the Metropolitan Chapter of Benevento for the return of the Beneventan Missal now in the possession of the British Library*. Last visited (13/1/2021) [https://www.lootedart.com/web\\_images/pdf/http\\_\\_\\_www.culture.gov.uk\\_publications\\_7412.pdf](https://www.lootedart.com/web_images/pdf/http___www.culture.gov.uk_publications_7412.pdf)

<sup>78</sup> Government of United Kingdom, *Spoliation advisory panel statute*. Gov.Uk. Last visited (13/1/2021) <https://www.gov.uk/government/groups/spoliation-advisory-panel>

of any asset belonging to the Library.<sup>79</sup> This fact may open a whole new chapter for the restitution of artefacts belonging to British museums and may have contributed to the constant denial of the state of the United Kingdom to proceed to mediation for the most notable case of the Parthenon Marbles.

#### **V.5. The Beirat Commission**

The republic of Austria, imminently after the Washington conference has taken action in favor of the victims during the Nazi era establishing in 1998 the Art Restitution Commission, also known as the Beirat Commission. The basis on which the commission has been created was the Federal Law on the Restitution of Works of Art (Art Restitution Act)<sup>80</sup>, which in 2009 broadened its applicability regarding the timeframe (from 1938-1945 to the whole Nazi era (1933-1945) ) and the geographical frame (From the looted artefacts on the soil of Austria to any region under Nazi occupation)<sup>81</sup>. The aim of it was to hear and to publish recommendations of cases of looted art with the purpose of restitution. Although the Federal state of Austria holds an infamous reputation in Art Law, because of the Altmann case, one should stress that since the establishment of the Beirat Commission, three hundred cases have been heard and most of them have accomplished the restitution to the victims during the Nazi era.<sup>82</sup>

#### **V.6. The French commission**

The French Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force During the Occupation (CIVS), was

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<sup>79</sup> Spoliation Advisory panel (2010) *Report of the Spoliation Advisory Panel in respect of a renewed claim by the Metropolitan Chapter of Benevento for the return of the Beneventan Missal now in the possession of the British Library*, The stationary office, London. Last visited (13/1/2021)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78078/Benevento\\_5119\\_HC448\\_7-9.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78078/Benevento_5119_HC448_7-9.pdf)

<sup>80</sup> 1998, Bundesgesetzblatt für die republik österreich, *Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen* Nr 181/1998

<sup>81</sup> Library of Congress Law (2009) *Austria: Restitution of Nazi-Looted Art. Library of Congress Law*. Last visited (13/1/2021) <https://www.loc.gov/law/foreign-news/article/austria-restitution-of-nazi-looted-art/>

<sup>82</sup> Burris, D.S. (2016). *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, Von Saher and Their Progeny*, (pp 427-430), John Marshall Review of Intellectual Property Law 394 15(3). Last visited (13/1/2021) <https://repository.law.uic.edu/ripl/vol15/iss3/2/>



established in 1999 and makes recommendations regarding compensation for assets looted by the Nazi regime or the Vichy Government. A worth mentioning fact with reference to this commission is that no separation has been made between cultural assets and any other commercial belongings,<sup>83</sup> which renders the restitution of cultural objects almost impossible and follows a more lenient perspective, focusing to the pecuniary value of the looted art. This viewpoint is apparently poor for a matter of this importance. The exclusion of the sentimental value of a cultural asset as a factor proves the ignorance of this commission to rectify claims that are engrafted with emotion. Moreover, even the compulsory decisions made by the commission, do not offer a permanent settlement, because of the potential to be appealed on the Administrative courts <sup>84</sup>. Since its establishment the commission has dealt with 877 cases for looted artworks. The vast majority of them was lead to compensation, others were denied and only a few cultural assets were returned.

#### **V.7. The “Ekkart” Commission**

Many other European countries have followed the Washington Principles and the common sense of justice for the victims by the Nazi regime. The Netherlands have also established the “Ekkart commission” or by its official name “The restitution committee” that encloses a multi-dimensional mission. The provenance research for looted art by the Nazi regime, the issuance of advice to the Ministry of Culture with respect to collection possessed by the Dutch state and last, the publish of binding opinions for disputes between the current possessor and the claimant are their primary targets.<sup>85</sup>.

#### **V.8. Resolution by private mediator**

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<sup>83</sup> Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force during the Occupation, Scope. CIVS . Last visited (13/1/2021) <http://www.civs.gouv.fr/en/the-civs/scope/>

<sup>84</sup> Burris, D.S. (2016). *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, Von Saher and Their Progeny*,(pp 427-430), John Marshall Review of Intellectual Property Law 394 15(3). Last visited (13/1/2021) <https://repository.law.uic.edu/ripl/vol15/iss3/2/>

<sup>85</sup> Burris, D.S. (2016). *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, Von Saher and Their Progeny*,(p 428), John Marshall Review of Intellectual Property Law 394 15(3). Last visited (13/1/2021) <https://repository.law.uic.edu/ripl/vol15/iss3/2/>

Disputes derived from the Nazi plunder can also be resolved by a private mediator.<sup>86</sup> That proves the case between Malewicz heirs and the city of Amsterdam. In 2003 fourteen artworks by Kazimir Malewicz, who had passed away were exported from the Netherlands to the United States and more precisely to the Guggenheim museum of New York and to the Menil Collection in Houston<sup>87</sup>. The heirs of Malewicz filed a suit for the recovery of the painting at the District Court for the District of Columbia against the City of Amsterdam, taking advantage of the Foreign Sovereign Immunities Act (FSIA) of 1976, claiming that the artwork was illegally possessed by the city of Amsterdam (and thus, this constituted a violation of international law which consequently leads to jurisdictional right)<sup>88</sup>, as it was confiscated by the Nazi regime and through a chain of transactions, the painting ended up at the Museum of the city of Amsterdam, that purchased them. The museum filed a motion to dismiss, which was rejected, resorting thus to the Court of Appeals for the District of Columbia<sup>89</sup>. Before the ruling by the court, a mediated settlement was achieved.

The settlement was a partial and conditional restitution. The heirs would receive five of the paintings in dispute, while the rest of the collection would remain in the possession of the museum of the City of Amsterdam. In exchange the heirs would drop any claims against the remaining paintings, terminating thus the long-time legal battle and acknowledging title of ownership to the museum for them.<sup>90</sup>

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<sup>86</sup> Campfens, E. (2019) *Restitution of Looted Art: What About Access to Justice?* (p.194).4 (1). Last visited (13/1/2021)

[https://www.researchgate.net/publication/334195958\\_Restitution\\_of\\_Looted\\_Art\\_What\\_About\\_Access\\_to\\_Justice](https://www.researchgate.net/publication/334195958_Restitution_of_Looted_Art_What_About_Access_to_Justice)

<sup>87</sup> Chechi, A. Velioglu, Renold, E. M. *Case 14 Artworks – Malewicz Heirs and City of Amsterdam*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/14-paintings-2013-malewicz-heirs-and-city-of-amsterdam>

<sup>88</sup> Chechi, A. Velioglu, Renold, E. M. *Case 14 Artworks – Malewicz Heirs and City of Amsterdam*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/14-paintings-2013-malewicz-heirs-and-city-of-amsterdam>

<sup>89</sup> Chechi, A. Velioglu, Renold, E. M. *Case 14 Artworks – Malewicz Heirs and City of Amsterdam*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/14-paintings-2013-malewicz-heirs-and-city-of-amsterdam>

<sup>90</sup> Chechi, A. Velioglu, Renold, E. M. *Case 14 Artworks – Malewicz Heirs and City of Amsterdam*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021)

## **VI. Negotiations regarding Nazi looted Art - The particular case of the United States of America**

In the United States of America, the most noteworthy effort regarding the restitution of degenerate Art is the Guidelines by the Association of the American Museums Directors (AAMD) at the same period of the Washington Conference. Establishing Guidelines akin to the Washington Principles, this report initiates a code of Ethics among museums and the acquisition of cultural assets with respect to possible provenance connected to looting by the Nazis. It calls upon the museums for open archives, but more significantly it bears the moral obligation that “the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner”<sup>91</sup>. Moreover, the guidelines propose mediation as the appropriate method of dispute. Despite this fact, negotiations as a form of dispute resolution has flourished with many cases proving it. The absence of a Panel in the United States<sup>92</sup>, which offers recommendations, likewise the response adopted by the European countries and consequently the inability to resort to mediation, in combination with the AAMD guidelines, which motivate the voluntary and amicable way of resolution, has offered the appropriate circumstances for the negotiations to be evolved as a form of dispute resolution. This assertion is corroborated by the plethora of cases resolved or intended to be resolved by negotiations between the parties

### **VI.1 The Rosenberg- Seattle Art Museum case**

One of the most interesting cases with regard to negotiation was between Seattle Art Museum and the heirs of Paul Rosenberg concerning a Matisse painting. In 1998 the heirs of P. Rosenberg filed a suit against the Seattle Art Museum requesting the restitution of the painting, claiming that it constitutes a piece of art spoiled by the Nazis. Prior to the suit, the claimants negotiated the restitution with the Museum

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<https://plone.unige.ch/art-adr/cases-affaires/14-paintings-2013-malewicz-heirs-and-city-of-amsterdam>

<sup>91</sup> Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era(1933-1945),(1998), *Association of the American Museums Directors Guidelines* . aamd.org . Last visited (13/1/2021)

<https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.pdf>

<sup>92</sup> Hickley, C. (2018). *Washington Principles: the restitution of Nazi-looted art is still a work in progress, 20 years on*. The Art Newspaper. Last visited (13/1/2021)

<https://www.theartnewspaper.com/news/restitution-of-nazi-looted-art-a-work-in-progress>.

which were according to them “very helpful and very genteel”<sup>93</sup>. The possession of this painting had occurred by transaction with the Knoedler art gallery. The Museum ordered an investigation by the Holocaust Art Restitution Project (HARP), which affirmed the accusations made by the heirs. The museum during the negotiations demanded to be suited in courts, in order to reconstitute the painting, due to the terms that are dictated for an institution acting under the public trust<sup>94</sup>. The ruling was in favor of the heirs and the painting was reconstituted. Because of the complexity of this case, another dispute had come up. The Museum asserted that the Knoedler Gallery was aware of the looted provenance. The dispute was resolved by negotiations<sup>95</sup>, by granting the right to the museum to choose a painting from the inventory of the gallery, or the cost of it and the full reimbursement on behalf of the gallery to the museum for the legal expenses caused by the transaction. Therefore, the Museum agreed to withdraw all charges.

This case, despite the abnormalities it may enclose, it derives as a result of the soft law and the principles that are entwined to it. One could argue that the negotiation proceedings did not initiate by the museum or the gallery, but rather by the heirs that accidentally found out about the whereabouts of the painting<sup>96</sup>. Although this allegation has a basis, it ignores the prematurity of the circumstances regarding those claims and the struggle for a transition from a chaotic environment with reference to provenance research and documentation, to an art trade with ethics and moral principles.

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<sup>93</sup> Fefer, M.D. (2006). *SAM ponders its options as deadline nears on ‘hot’ Matisse*. *Seattle Weekly*. Last visited (13/1/2021) <https://www.seattleweekly.com/news/sam-ponders-its-options-as-deadline-nears-on-hot-matisse/>

<sup>94</sup> Chechi, A. Contel, R. Renold, M.A. *Case Odalisque Painting – Paul Rosenberg Heirs and Seattle Art Museum*. ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/odalisque-painting-2013-paul-rosenberg-heirs-and-seattle-art-museum>

<sup>95</sup> Chechi, A. Contel, R. Renold, M.A. *Case Odalisque Painting – Paul Rosenberg Heirs and Seattle Art Museum*. ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/odalisque-painting-2013-paul-rosenberg-heirs-and-seattle-art-museum>

<sup>96</sup> Birnkrant, M.J. (2019), *The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-looted Art*, (p.230). Washington University Global 18(1) Last visited (13/1/2021)

[https://openscholarship.wustl.edu/law\\_globalstudies/vol18/iss1/8](https://openscholarship.wustl.edu/law_globalstudies/vol18/iss1/8)

## **VI.2 Tax policies as an element on Negotiations in art-related disputes.**

### **The Goodman – Metropolitan Museum case**

It is evident that the tax deduction policy is desirable and promotes the intent on behalf of the possessors to negotiate a possible restitution of a work of art with dubious provenance and possibly a looted artifact. An illustrative example of this allegation is the case between the heirs of a victim of the Holocaust, Friedrich Goodman, who was beaten to death for not signing a contract granting all his possessions to the Nazi regime, and a Billionaire businessman, Daniel C. Searle. Nick and Simon Goodman recognized the looted painting at the catalogue of an exhibition at the Metropolitan Museum in New York and filed a suit, seeking damages and recovery of the painting “Landscape with Smokestacks” by Edgar Degas. The estimated value of the artwork was 1.100.000 U.S. Dollars <sup>97</sup>and the juxtaposition had concentrated the media attention . At the margin of the beginning of the trial, the two sides reached a settlement through negotiations. The settlement included the transferring half of the ownership of the painting by Mr. Searle to the heirs of Goodman, provided that this would be sold, after evaluation of the price of the painting, to the Metropolitan Museum. The other half was donated to the Museum, pursuing thus a tax deduction return by the U.S. state. The settlement eventually disgruntled the Businessman, due to the final evaluation made for the artwork and the final tax deduction at the amount of \$243,750 <sup>98</sup>did not cover even the half of the initial investment made on the painting (The work of art was bought by Mr. Searle \$850,000)<sup>99</sup>

A superfluous reading of this case indicates that this settlement brought in benefit in multiple levels. The emotion damage made to the Goodman family was rectified, the

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<sup>97</sup> Rhodes, A.M. (2006), *On Art Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code*, (p.505) ,Loyala University Chicago.San Diego Law Review. Last visited (13/1/2021)

<https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1043&context=facpubs>

<sup>98</sup> Roodt, C. (2013). *State Courts or ADR in Nazi-era Art Disputes: A Choice "More Apparent Than Real"?* (pp. 443-446).University of Aberdeen, Cardozo Journal of Dispute Resolution, 14(2). Last visited (13/1/2021) <http://cardozo.jcr.com/wp-content/uploads/2013/03/CAC205.pdf>

<sup>99</sup> Rhodes, A.M. (2006), *On Art Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code*, (p.504-506) ,Loyala University Chicago. San Diego Law Review. Last visited (13/1/2021)  
<https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1043&context=facpubs>

museum could exhibit the painting, the public would not lack the plain sight of a masterpiece and the bona fide purchaser has been paid damages. However, a more thorough analysis reveals the partial benefit for all of the stakeholders of this case, except for one. The partial reimbursement of the bona fide purchaser in combination with the failure to reconstitute the artwork to the heirs, turned undoubtedly in favor of the museum, that accomplished its demand for acquiring the masterpiece. Proof of this assertion is that this example has not been followed to a great extent <sup>100</sup>

### **VI.3 Meyer Heirs and Fred Jones Jr. Museum of Art of the University of Oklahoma**

The restitution of a looted during the Holocaust artwork through negotiations may be proven hard, however the initiation of the formal lawsuit, even if the case falls under the international private law, may function as a pressure leverage. The dispute that arose between Meyer Heirs and Fred Jones Jr. Museum of Art of the University of Oklahoma confirms this allegation. Raoul Meyer, was a prominent art collector and part of his collection was the Camille Pissarro's painting "La bergère rentrant des moutons". Despite his efforts to secure the painting <sup>101</sup>, it was eventually seized by the Nazi regime and before ending to the Fred Jones Jr Museum of Art, it was in the possession of a Swiss Art Dealer Christoph Bernoulli. Raoul Meyer traced the painting and filed a suit against Christoph Bernoulli in Basel, but the ruling came against him, because of the inability of proof of bad faith. <sup>102</sup> The painting had various transactions and eventually ended at the University of Oklahoma, at the Fred Jones Jr Museum of Art. In 2013 Meyer filed a suit in New York <sup>103</sup>, since the last transaction

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<sup>100</sup> Roodt, C. (2013). *State Courts or ADR in Nazi-era Art Disputes: A Choice "More Apparent Than Real"?* (pp. 443-446). University of Aberdeen, Cardozo Journal of Dispute Resolution, 14(2). Last visited (13/1/2021) <http://cardozo.jcr.com/wp-content/uploads/2013/03/CAC205.pdf>

<sup>101</sup> Aleksanyan, N.G. Chechi, A. Renold, M.A. *La Bergère – Meyer Heirs and Fred Jones Jr. Museum of Art*, ArThemis, Art-Law Centre, University of Geneva Last visited (13/1/2021). <https://plone.unige.ch/art-adr/cases-affaires/odalisque-painting-2013-paul-rosenberg-heirs-and-seattle-art-museum>

<sup>102</sup> Birnkrant, M.J. (2019), *The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-looted Art*, (p.230). Washington University school of law. Washington University Global Studies. 18(1) Last visited (13/1/2021) [https://openscholarship.wustl.edu/law\\_globalstudies/vol18/iss1/8](https://openscholarship.wustl.edu/law_globalstudies/vol18/iss1/8)

<sup>103</sup> Aleksanyan, N.G. Chechi, A. Renold, M.A. *La Bergère – Meyer Heirs and Fred Jones Jr. Museum of Art*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/odalisque-painting-2013-paul-rosenberg-heirs-and-seattle-art-museum>

made for the artwork to be acquired by the university occurred in New York<sup>104</sup>. Nevertheless, the court did not recognize jurisdiction and dismissed the case. In 2014 Meyer refiled at the US District Court for the Western District of Oklahoma and the University of Oklahoma filed a motion to dismiss the case on jurisdictional grounds. The concurrent, with the legal proceedings, negotiations managed to reach a settlement for the case which seems to be equitable, appropriate, and mutually agreeable. The painting would be exhibited for the first five years at mutually agreed museum in France, after the Meyers would gift the painting to it, and for three years alternatively at the Fred Jones Jr Museum of Art and the museum of their choice. It was also agreed that no movie, television show and other commercial products could be exploited regarding the litigation matter, without the consent of both of the parties, and should they exploit it, the profits would be split. Last, the settlement agreement is recognized by both parties as the final settlement and it was agreed that all pending litigation proceedings would be dismissed with respect to this particular painting.<sup>105</sup>

This case includes a plethora of factors, decisive for the type of the settlement adopted. Firstly, an effortless conclusion to be made is the importance of the public interest to this case and the influence this made to the University of Oklahoma to come a settlement. The aforementioned fact could not stand on its own.<sup>106</sup> The establishment of Principles and Ethics with reference to transaction of works of art are also engrafted to the public opinion, functioning as a multiplied pressure leverage, even if the consequences of the denial to follow the AAMD guidelines are lenient and the museum violated many of them. This element constitutes a success of the soft law principles. The non-binding obligations do not target immediately to the signatory parts, but they also raise the public awareness and sensitivity acting thus as the means of enforcement. In addition, the major benefit from this settlement was gained by the public and the art world. A masterpiece is exhibited, it does not bear a juxtaposition

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<sup>104</sup> Bickford, A.R., (2017) *Nazi-Looted Art: Preserving a Legacy*, (p.127) Case West Reserve University Journal of International Law. 49(1). Last visited (13/1/2021) <https://scholarlycommons.law.case.edu/jil/vol49/iss1/9>

<sup>105</sup> Allen, S., Ellis, R. (2016). *University of Oklahoma settlement agreement revealed in Nazi-looted art case*. Oklahoman.com. Last visited (13/1/2021) <https://oklahoman.com/article/5480678/university-of-oklahoma-settlement-agreement-revealed-in-nazi-looted-art-case>.

<sup>106</sup> Bickford, A.R., (2017) *Nazi-Looted Art: Preserving a Legacy*, (p.130) Case West Reserve University Journal of International Law. 49(1). Last visited (13/1/2021) <https://scholarlycommons.law.case.edu/jil/vol49/iss1/9>

and more importantly it is not identified with disgraced policy as a result of the Nazi era. The most noteworthy and the most defining characteristic that this paper would be incomplete without its reference, with regards to this case is the position of litigation on it. Although the matter of applicability of res judicata (namely the recognition of the Swiss ruling by the Tenth Circuit)<sup>107</sup> remained pending, the risk for the university was unbearable. In conclusion, it is apparent that this settlement fulfilled the AAMD demands for an “equitable, appropriate, and mutually agreeable manner”<sup>108</sup> to resolve Nazi looted art cases.

Evident is considered the fact that statutes of limitation function as a deterrent for resorting to litigation with reference to Nazi looted cultural objects and consequently as a deterrent for initiating negotiation proceedings, since the negotiating power of the holocaust victims is not strengthened through the menace of litigation, but is rather impoverished. The effect of the statutes of limitation to the negotiation proceedings renders the Act mentioned below, indispensable for a holistic approach by this paper

#### **VI.4 The Holocaust Expropriated Art Recovery Act of 2016**

In 2016 the United States Congress enacted the Holocaust Expropriated Art Recovery Act of 2016 (hereinafter HEAR Act). By this Act, the statutes of limitation for replevin objects looted during the period starting from 1 of January 1933 until 31 of December 1945, are standardized at 6 years after the actual knowledge of the location of the object and will remain active until 31 of December 2026<sup>109</sup>. The necessity of this Act is impressed in the fact that the museums of United States burden de facto the safeguarding of their collection and, even if they are also committed by the obligation to examine diligently any demand for return, a potential favorable –for their behalf-

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<sup>107</sup> Bickford, A.R., (2017) *Nazi-Looted Art: Preserving a Legacy*, (p.127) Case West Reserve University Journal of International Law. 49(1). Last visited (13/1/2021)  
<https://scholarlycommons.law.case.edu/jil/vol49/iss1/9>

<sup>108</sup> Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945), (1998), Last visited (13/1/2021) *Association of the American Museums Directors Guidelines* ( D(2) ) aamd.org .  
<https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.pdf>

<sup>109</sup> 114th Congress Public Law 308, S.1943 (2016), *Holocaust Expropriated Art Recovery Act of 2016* (Section 5(g)). Government Publishing Office. Last visited (13/1/2021)  
<https://www.congress.gov/bills/114/congress/house-bill/6130/text>. U.S. Government Publishing Office.



dismissal by a court on the grounds of limitation renders a claim weak and therefore the museums hold the upper hand.<sup>110</sup> Another aspect that can enlighten the importance of the HEAR Act is the radicalism it encloses. Setting the limitation period to six years after the actual knowledge of the artefact is pioneering in view of the fact that other countries much more devastated by the Nazi regime have established stricter limitations. For instance, Poland has set the statute in six months after the knowledge,<sup>111</sup> while in the Netherlands, claims for the restitution of art looted by the Nazi are time barred and even the Ekkart commission cannot hear those claims<sup>112</sup>. In the German law until 2014, the statute of limitation was set to 30 years after the crime and the lift of this restriction seemed to have little effect, rendering the legislation inactive.<sup>113</sup>

#### **VI.5. The portrait of Wally case**

The United States of America have been pioneers with regards to the resolution of the Nazi looted art. In 2010 in the renowned case of the portrait of Wally, the Federal State had played the major role for a fair solution to the Nazi victims. Element of utmost important for the comprehension of the effect of this case is the disclosure of its chronicle. Mrs. Bondi, was a Jew art collector, possessor of the “portrait of Wally”. The painting by the Prominent artist Egon Schiele, who also run a gallery in Austria. With the invasion of the Nazis, the gallery was confiscated and the artwork was forfeited to an officer of the Nazi regime.<sup>114</sup> At the end of the war, the masterpiece

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<sup>110</sup> Frankel, S.J. (2020) *The HEAR Act and Laches After Three Years* (p.440), University of North Carolina, North Carolina Journal of International Law.45(2). Last visited (13/1/2021) <https://www.cov.com/en/news-and-insights/insights/2020/01/the-hear-act-and-laches-after-three-years>

<sup>111</sup> Birnkrant, M.J. (2019), *The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-looted Art*, (p.220) . Washington University school of law. Washington University Global Studies Law Review 18(1) Last visited (13/1/2021) [https://openscholarship.wustl.edu/law\\_globalstudies/vol18/iss1/8](https://openscholarship.wustl.edu/law_globalstudies/vol18/iss1/8)

<sup>112</sup> Laws, Policies and Guidelines: Comparative Art Law relating to Nazi-Confiscated Art.Lootedart.com Last visited (13/1/2021) [https://www.lootedart.com/TJMA6F416801\\_print;Y](https://www.lootedart.com/TJMA6F416801_print;Y).

<sup>113</sup> Birnkrant, M.J. (2019), *The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-looted Art*, (p.218). Last visited (13/1/2021) Washington University school of law. Washington University Global Studies Law Review 18(1) [https://openscholarship.wustl.edu/law\\_globalstudies/vol18/iss1/8](https://openscholarship.wustl.edu/law_globalstudies/vol18/iss1/8)

<sup>114</sup> : Contel, R. Soldan, G. Chechi, A. *Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/case-portrait-of-wally-2013-united-states-and-estate-of-lea-bondi-and-leopold-museum>

was transferred to the Austrian government and was eventually exchanged for another Schiele painting, ending up to Rudolph Leopold. In 1994, the Leopold museum was the owner of the painting and loaned it to the Museum of Modern Art in New York<sup>115</sup>. In 1998 the District Attorney of New York County issued a subpoena after Mrs. Bondi heirs filed a claim highlighting the looting provenance of the painting and demanding for recovery and initiating thus a litigation proceeding that lasted twelve years, in which firstly the District Attorney of New York County seized the painting, the museum resorted to the New York Court of Appeal on the grounds of the protection under New York's Arts and Cultural Affairs Law<sup>116</sup>. Eventually the masterpiece was seized U.S. Customs Service after the U.S. Attorney for the Southern District of New York ordered forfeiture by the Leopold museum, as it was a stolen property unlawfully imported within the United States<sup>117</sup>. A week prior to the trial, a settlement was announced.

The Bondi heirs would waive any claim for the painting and the Leopold museum in exchange will pay 19 million U.S. dollars. In addition, since almost any art-related dispute encloses a sentimental value in its demand, an appropriate settlement that is adopted should also consider this factor. In this specific case it was agreed that the painting would be loaned and exhibited for three weeks at the Museum of Jewish Heritage in New York and after the return of it to the Leopold museum it would be accompanied by a sign stating "based on the evidence presented during the case, the United States District Court in New York concluded in 2009 that the Painting was the personal property of Lea Bondi Jaray and that it was stolen from her in Vienna in the

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<sup>115</sup> United States Attorney Southern District of New York (2010), press release. *United States announces 19 million U.S. Dollars Settlement in Case of painting stolen by Nazis*. Last visited (13/1/2021)

<https://www.justice.gov/archive/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf>

<sup>116</sup> Contel, R. Soldan, G. Chechi, A. *Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum*, Last visited (13/1/2021) ArThemis, Art-Law Centre, University of Geneva. <https://plone.unige.ch/art-adr/cases-affaires/case-portrait-of-wally-2013-united-states-and-estate-of-lea-bondi-and-leopold-museum>

<sup>117</sup> Spiegler, H. N. (2010) *What the Lady Has Wrought: The Ramifications of the Portrait of Wally Case*. Herrick, Feinstein LLP. Last visited (13/1/2021) <https://www.herrick.com/publications/what-the-lady-has-wrought-the-ramifications-of-the-portrait-of-wally-case/#:~:text=The%20Government's%20complaint%20alleged%20that,the%20National%20Stolen%20Property%20Act.>

late 1930's by Friedrich Welz, who was a member and collaborator of the Nazi party"<sup>118</sup>

This settlement, resembles to the Malevich settlement mentioned above, however in this case there is an absence of a third person mediating the dispute. The impact of the "Portrait of Wally" case cannot only be analyzed on the grounds of the settlement agreement, namely the ramification of the victims during the holocaust and a harsh critic on the failure to restitute the artwork lacks comprehension of the circumstances. This dispute raised the public awareness on the Nazi looted artworks and the major role of the Federal State forced the museums to establish a stricter policy when referring to loans of artefacts from foreign institutions<sup>119</sup>. Furthermore, the resolution outside of courts and the appearance of the state as the guarantor for a just and fair solution, encourages the victims of holocaust to come up. Identifying the "portrait of Wally" case as a game turnover for the disputes derived from Nazi plunder is not considered exaggeration, when viewing the establishment of international principles after the settlement and the case itself as a relation of causality rather than a coincidence.

## **VII. The potential of an UNESCO Panel for Nazi Looted Art**

The 2009 UNESCO Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War did not reach a consensus, at the negotiations of the member states (three member states were opposite to the principles)<sup>120</sup> and it was never adopted<sup>121</sup>. On this draft declaration it was proposed

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<sup>118</sup> United States District Court Southern District of New York (2010). *Stipulation and order of settlement and discontinuance*. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/case-portrait-of-wally-2013-united-states-and-estate-of-lea-bondi-and-leopold-museum/stipulation-and-order-of-settlement-and-discontinuance-united-states-of-america-v-portrait-of-wally-s-d-n-y-2010/view>

<sup>119</sup> Mullery, J. (2010). "Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims." (P.661) *Cardozo Journal of Conflict Resolution* 11(1) Last visited (13/1/2021). <https://www.semanticscholar.org/paper/FULFILLING-THE-WASHINGTON-PRINCIPLES%3A-A-PROPOSAL-TO-Mullery/76ed6837d1aabe5ac0bee71f1616b0cbd0b19f4b>

<sup>120</sup> Carducci, G. (2019) *Looted cultural objects in connection to the second world war* Last visited (13/1/2021) <https://www.europarl.europa.eu/cmsdata/190734/carducci-looted-cultural-objects-original.pdf>

<sup>121</sup> Campfens, E. (2017) *Nazi Looted Art: A Note in Favour of Clear Standards and Neutral Procedures*. (p.336). University of Leiden, *Journal of Art Antiquity and Law* 22(1). Last

the use of the mediation and negotiations as alternative dispute resolution processes for the cultural objects plundered during the period between 1933-1945 (the definition of it is derived from the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property)<sup>122</sup>. The declaration though did not envisage the establishment of an intergovernmental committee to resolve by mediation such claims, but rather reaffirms the Washington Principles.

An international committee established by the UNESCO on the standards of the equivalent European panels, would be beneficial for the resolution of the Nazi looted art. The inter-state treaty would offer this committee, after the initiating of negotiations between them. To this commission the parties would be able to resort after they have already exhausted the means within the borders of their state, either litigation or other alternative dispute resolution methods. That fact would also bring amendments to the rules and procedures of the European panels, regarding the acceptance of binding nature of the settlement of the behalf of the parties. This committee would also function as a supervisory mechanism for the European Panels acting as a deterrent for resolutions that do not fulfill the requirements for a just and a fair settlement between the parties. In fact, it would supervise the pressure made by the stakeholders (and mostly the state owned museums) and the degree this pressure has influenced the impartiality and independency of the commissions, since they hold a strong state connection. The reluctance of resolving a dispute regarding Nazi looted art on behalf of the victims (and consequently against the state) is apparent. Thus, any of those parties would be able to dispute the settlement provided by those commissions, provided that the standards mentioned above were not met. The commission established by UNESCO for the looted art during the period 1933-1945, would be limited of existence (until 2035) and it would be consisted of mediators selected by the member states, experts on those matters and it would also offer advisory opinions by experts on matters of provenance. Last, before the initiation of proceedings the parties would accept the settlement as the definite resolution,

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visited (13/1/2021)

[https://www.researchgate.net/publication/323628648\\_Nazi\\_Looted\\_Art\\_A\\_Note\\_in\\_Favour\\_of\\_Clear\\_Standards\\_and\\_Neutral\\_Procedures](https://www.researchgate.net/publication/323628648_Nazi_Looted_Art_A_Note_in_Favour_of_Clear_Standards_and_Neutral_Procedures)

<sup>122</sup> UNESCO 2009 *Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second*, Paris.France. Last visited (13/1/2021)

<https://www.lootedart.com/OVPOOK917841>

dropping any claim before the courts or other alternative dispute methods of resolution.

### **VIII. Conclusion**

The following chapter is exhibited as the capstone of the study in order to set out its primary conclusions. Firstly, although mediation and negotiations have been used as supplementary methods, covering the legal vacuums, the assertion supporting the outweigh of litigation procedure by those means of dispute resolution for cultural property disputes can be justified by the thorough investigation of the current literature. Moreover, the effect of politics into negotiations has been present with reference to the cultural property disputes in the current environment and the hypothesis of a one-causal source is inexpedient, in contrast to a multifactorial analysis, which has the potential to unravel the matter.

Additionally, the institutional mediation offered by the rules of procedure of ICPRCP, is able to release the dynamic, which is engrafted with, only by rectifying the issues detected in its source, namely, its internal implications. On the contrary, the mediation provided by the ICOM-WIPO art and cultural heritage is considered –in the view of the author- a more efficient instrument and this derives –to a great extent- from its non-governmental composition.

The imperative of the resolution of disputes regarding Nazi looted art does no longer burden litigation and the confrontation has been implemented in various manners. This variation is detected on the basis of geographical regions. The “old continent” has adopted a panel-based approach, whereas the United States of America have strengthened their explicit moral principles leading to a more negotiation-based approach. This differentiation, in the view of the author, may be the product of the political and economic structure of each region, since the United States of America have been longtime proponents of a more free-trade structure minimizing the state intervention. Furthermore, international disputes require international methods of resolution and thus the establishment of a Panel mentioned above is considered essential.

Last, but not least the extent use of the methods analyzed on this paper is recent and the inferences may be premature. An entirely accurate study on mediation and

negotiations for art related disputes will only be plausible by their persistent and systematic repetition.

## **Bibliography**

### **A) E-Books**

- 1) Blake, J. E. (2015). *International cultural heritage law*, 1. NY: USA. Oxford University Press.
- 2) Chechi A. (2014), *The Settlement of International Cultural Heritage Disputes*. NY: USA. Oxford University press
- 3) Stamatoudi, I. (2011), *Cultural Property Law and Restitution A Commentary to International Conventions and European Union Law*, Cheltenham, UK: Edward Elgar
- 4) Swann, W. (2009). *21st-century Cambodia: view and vision*, Global Vision Publishing House
- 5) Vadi, V., & Schneider, H. E. G. S. (2016). *Art, Cultural Heritage and the Market Ethical and Legal Issues*. Berlin: Germany Springer Berlin.

### **B) Legal instruments**

1. 114th Congress Public Law 308, S.1943 (2016), *Holocaust Expropriated Art Recovery Act of 2016*. Government Publishing Office. Last visited (13/1/2021) <https://www.congress.gov/bill/114th-congress/house-bill/6130/text>. U.S. Government Publishing Office.
2. 1943, *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control*. London. Last visited (13/1/2021) <https://history.state.gov/historicaldocuments/frus1943v01/d456>
3. 1968. *Brussels Convention on jurisdiction and the enforcement of judgments in Civil and Commercial Matters*, Last visited (13/1/2021) [https://curia.europa.eu/common/recdoc/convention/en/c-textes/\\_brux-textes.htm](https://curia.europa.eu/common/recdoc/convention/en/c-textes/_brux-textes.htm)
4. 1988. *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. Last visited (13/1/2021)
5. 1998, Bundesgesetzblatt für die republik österreich, Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen Nr 181/1998
6. Government of United Kingdom, *Spoliation advisory panel statute*. Gov.Uk. Last visited (13/1/2021) <https://www.gov.uk/government/groups/spoliation-advisory-panel>

7. ICOM-WIPO (2011) *Mediation Rules*. Last visited (13/1/2021)  
<https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/>
8. International Committee of the Red Cross (ICRC), (2005). *Customary International Humanitarian Law* Volume I: Rules. Last visited (13/1/2021)  
<https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>
9. International Council of Museums. (1986). *Code of ethics: ICOM code of ethics for museums*. Buenos Aires, Argentina: International Council of Museums. Last visited (13/1/2021) <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>
10. Limitation act (2002), Ontario, Canada.  
<https://www.ontario.ca/laws/statute/02l24>
11. Second International Peace Conference, (1907). *Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*. Hague. Last visited (13/1/2021) <https://ihl-databases.icrc.org/ihl/INTRO/195>
12. UNESCO (1970), *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Paris
13. UNESCO (1978), *Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation* Paris
14. UNESCO (1998), *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, Rome, Italy
15. UNESCO (2009) *Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second*, Paris. Last visited (13/1/2021)  
<https://www.lootedart.com/OVPOOK917841>
16. UNESCO intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, (1999). *International Code of Ethics for Dealers in Cultural Property*. Last visited (13/1/2021)  
<http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/legal-and-practical-instruments/unesco-international-code-of-ethics-for-dealers-in-cultural-property/>



17. UNESCO, (2010), *rules of procedure for mediation and conciliation in accordance with article 4, paragraph 1, of the statutes of the intergovernmental committee for promoting the return of cultural property to its countries of origin or its restitution in case of illicit appropriation*, Paris, France
18. United States District Court Southern District of New York (2010). *Stipulation and order of settlement and discontinuance*. Last visited (13/1/2021)  
<https://plone.unige.ch/art-adr/cases-affaires/case-portrait-of-wally-2013-united-states-and-estate-of-lea-bondi-and-leopold-museum/stipulation-and-order-of-settlement-and-discontinuance-united-states-of-america-v-portrait-of-wally-s-d-n-y-2010/view>
19. Washington Conference On Holocaust-Era Assets (1998), *Washington Principles on Nazi-Confiscated Art*. Last visited (13/1/2021)  
<https://www.lootedartcommission.com/Washington-principles>

### C) Journals

- 1) Bickford, A.R., (2017) *Nazi-Looted Art: Preserving a Legacy*, Case West Reserve University Journal of International Law. 49(1). Last visited (13/1/2021) <https://scholarlycommons.law.case.edu/jil/vol49/iss1/9>
- 2) Birnkrant, M.J. (2019), *The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-looted Art*, Washington University school of law. Washington University Global Studies 18(1). Last visited (13/1/2021) [https://openscholarship.wustl.edu/law\\_globalstudies/vol18/iss1/8/](https://openscholarship.wustl.edu/law_globalstudies/vol18/iss1/8/)
- 3) Burris, D.S. (2016). *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, Von Saher and Their Progeny*, John Marshall Review of Intellectual Property Law 394 15(3). Last visited (13/1/2021) <https://repository.law.uic.edu/ripl/vol15/iss3/2/>
- 4) Campfens,E. (2017) *Nazi Looted Art: A Note in Favour of Clear Standards and Neutral Procedures*. University of Leiden, Journal of Art Antiquity and Law 22(1). Last visited (13/1/2021)

- [https://www.researchgate.net/publication/323628648\\_Nazi\\_Looted\\_Art\\_A\\_Note\\_in\\_Favour\\_of\\_Clear\\_Standards\\_and\\_Neutral\\_Procedures](https://www.researchgate.net/publication/323628648_Nazi_Looted_Art_A_Note_in_Favour_of_Clear_Standards_and_Neutral_Procedures)
- 5) Campfens, E. (2019) *Restitution of Looted Art: What About Access to Justice?* 4 (1). Last visited (13/1/2021)  
[https://www.researchgate.net/publication/334195958\\_Restitution\\_of\\_Looted\\_Art\\_What\\_About\\_Access\\_to\\_Justice](https://www.researchgate.net/publication/334195958_Restitution_of_Looted_Art_What_About_Access_to_Justice)
  - 6) Demarsin, B. (2011). *Let's Not Talk about Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, Brooklyn Journal of International Law 37(1). Last visited (13/1/2021)  
<https://brooklynworks.brooklaw.edu/bjil/vol37/iss1/3/>
  - 7) Frankel, S.J. (2020) *The HEAR Act and Laches After Three Years* University of North Carolina, North Carolina Journal of International Law. 45(2). Last visited (13/1/2021) <https://www.cov.com/en/news-and-insights/insights/2020/01/the-hear-act-and-laches-after-three-years>
  - 8) Grabowsky, V, Deth, S. (2018). *Heritage and Nationalism in the Preah Vihear Dispute: Voices from Cambodia. Discourses on the Preah Vihear Conflict*. Last visited. (13/1/2021)  
[https://www.academia.edu/8744802/Heritage\\_Nationalism\\_and\\_Discourses\\_on\\_the\\_Preah\\_Vihear\\_Dispute](https://www.academia.edu/8744802/Heritage_Nationalism_and_Discourses_on_the_Preah_Vihear_Dispute)
  - 9) Kreder, J. A., (2009). *The New Battleground of Museum Ethics and Holocaust Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?* Oregon Law Review, 88 (1). Last visited (13/1/2021)  
<https://ssrn.com/abstract=1410802>
  - 10) Lerner, E.R. (1998), *The nazi art theft problem and the role of the museum: a proposed solution to disputes over title*. Journal of international law and politics. 31(15). Last visited (13/1/2021)  
<https://coupdefoudre.com/CurrentArticle/NaziLootedArt.pdf>
  - 11) Mullery, J. (2010). *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*. Cardozo Journal of Conflict Resolution 11(1). Last visited (13/1/2021)  
<https://www.semanticscholar.org/paper/FULFILLING-THE-WASHINGTON-PRINCIPLES%3A-A-PROPOSAL-TO-Mullery/76ed6837d1aabe5ac0bee71f1616b0cbd0b19f4b>

- 12) O'donnell, T. (2011). *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*. European Journal of International Law, 22(1), Last visited (13/1/2021)  
<https://doi.org/10.1093/ejil/chr004>
- 13) Rhodes, A.M. (2006), *On Art Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code*. Loyola University Chicago. San Diego Law Review. Last visited (13/1/2021)  
<https://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1043&context=facpubs>
- 14) Roodt, C. (2013). *State Courts or ADR in Nazi-era Art Disputes: A Choice "More Apparent Than Real"?* University of Aberdeen, Cardozo Journal of Dispute Resolution, 14(2). Last visited (13/1/2021) <http://cardozo.jcr.com/wp-content/uploads/2013/03/CAC205.pdf>
- 15) Shehade M., Fouseki K. (2016), *The Politics of Culture and the Culture of Politics: Examining the Role of Politics and Diplomacy in Cultural Property Disputes* International Journal of Cultural Property, 23(4). Last visited (13/1/2021) doi:10.1017/S0940739116000308

#### **D) Websites**

- 1) Art Commissions: Advisory Commission on the return of cultural property seized as a result of Nazi persecution (Beratende Kommission), [lootedart.com](http://lootedart.com). Last visited (13/1/2021)  
<https://www.lootedart.com/MFEU4E88305>
- 2) Art Commissions: Advisory Commission on the return of cultural property seized as a result of Nazi persecution (Beratende Kommission). Last visited (13/1/2021) <https://www.lootedart.com/MFEU4E88305>
- 3) Government of United Kingdom, Spoliation advisory panel statute.Gov.Uk. Last visited (13/1/2021)  
<https://www.gov.uk/government/groups/spoliation-advisory-panel>
- 4) Press and information office of the federal government of Germany (2013). Press release Recommendation of the Advisory Commission for the return of cultural assets seized as a result of Nazi persecution. Last visited (13/1/2021)

[https://www.lootedart.com/web\\_images/pdf2/13-04-09%20BerKomm%20zu%20Flechtheim-Koln.pdf](https://www.lootedart.com/web_images/pdf2/13-04-09%20BerKomm%20zu%20Flechtheim-Koln.pdf)

- 5) Recover. Art Loss Register. Last visited(13/1/2021)  
<https://www.artloss.com/recover/>.
- 6) Stolen works of Art Database. Interpol. Last visited (13/1/2021)  
<https://www.interpol.int/en/How-we-work/Databases/Stolen-Works-of-Art-Database>
- 7) The position of the Trustees of the British Museum.The British Museum.  
Last visited (13/1/2021) <https://www.britishmuseum.org/about-us/british-museum-story/objects-news/parthenon-sculptures/parthenon-sculptures-trustees>

#### **E) Theses**

- 1) Bendetta, M. (2019). *The recovery of cultural property in international law: collaborative settlements of disputes*. Master's thesis, Luiss Guido Carli. Luiss Thesis Biblioteca. Last visited (13/1/2021)  
<https://tesi.luiss.it/id/eprint/25133>
- 2) Kekeris N.I. (2013). *A study in Nazi looted art cases. Traditional and modern ways of restitution*. Master's Thesis. International Hellenic University. IHU Repository. <https://repository.ihu.edu.gr/xmlui/handle/11544/667>

#### **F) Reports**

- 1) Carducci,G. (2019) *Looted cultural objects in connection to the second world war* Last visited (13/1/2021)  
<https://www.europarl.europa.eu/cmsdata/190734/carducci-looted-cultural-objects-original.pdf>
- 2) House of Commons (2010) *Report of the spoliation advisory panel in respect of an oil sketch by sir peter paul rubens, 'the coronation of the virgin', now in the possession of the samuel courtauld trust*, The stationary office ,London. Last visited (13/1/2021)  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/77981/7349\\_HC\\_655\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/77981/7349_HC_655_Accessible.pdf)
- 3) Renold ,M.A. (2016). *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations*, (p.25)  
directorato general for internal policies policy department c: citizens' rights and constitutional affairs. Last visited (13/1/2021)

[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU%282016%29556947](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282016%29556947)

2

## G) Articles

- 1) Allen, S. ,Ellis, R.(2016). *University of Oklahoma settlement agreement revealed in Nazi-looted art case*. Oklahoman.com. Last visited (13/1/2021) <https://oklahoman.com/article/5480678/university-of-oklahoma-settlement-agreement-revealed-in-nazi-looted-art-case>.
- 2) BBC. (2009). *France's Louvre museum returns five frescoes to Egypt*. BBC News. Last visited (13/1/2021) <http://news.bbc.co.uk/2/hi/europe/8412762.stm>.
- 3) Fefer,M.D.(2006). *SAM ponders its options as deadline nears on 'hot' Matisse*. Seattle Weekly. Last visited (13/1/2021) <https://www.seattleweekly.com/news/sam-ponders-its-options-as-deadline-nears-on-hot-matisse>
- 4) Hickley, C. (2018). *Washington Principles: the restitution of Nazi-looted art is still a work in progress, 20 years on*. The Art Newspaper. Last visited (13/1/2021) <https://www.theartnewspaper.com/news/restitution-of-nazi-looted-art-a-work-in-progress>.
- 5) Mashberg, A. , Blumenthal, R. (2013). *Disputed Statue to Be Returned to Cambodia*. The New York Times. Last visited (13/1/2021) <https://www.nytimes.com/2013/12/13/arts/design/disputed-statue-to-be-returned-to-cambodia.html>.
- 6) Spiegler, H. N. (2010) *What the Lady Has Wrought: The Ramifications of the Portrait of Wally Case*. Herrick, Feinstein LLP. Last visited(13/1/2021) <https://www.herrick.com/publications/what-the-lady-has-wrought-the-ramifications-of-the-portrait-of-wally-case/#:~:text=The%20Government's%20complaint%20alleged%20that,the%20National%20Stolen%20Property%20Act>
- 7) *Why was the Sale of the Guelph Treasure not a Forced Sale?* - Stiftung Preußischer Kulturbesitz. Last visited (13/1/2021) <https://www.preussischer-kulturbesitz.de/newsroom/dossiers-and-news/all->

dossiers/dossier-the-guelph-treasure/why-was-the-sale-of-the-guelph-treasure-not-a-forced-sale.html?L=1..

## H) Case Reviews

- 1) Aleksanyan,N.G. Chechi,A.Renold,M.A. La Bergère – *Meyer Heirs and Fred Jones Jr. Museum of Art*. ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/odalisque-painting-2013-paul-rosenberg-heirs-and-seattle-art-museum>
- 2) Bursey, L. , Velioglou,E. Chechi A. ,Renold M.A. (2015) ,*Ka Nefer Nefer Mask – United States v. Mask of Ka Nefer Nefer*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/ka-nefer-nefer-mask-2013-united-states-v-mask-of-ka-nefer-nefer>
- 3) Chechi,A. Contel,R.Renold,M.A. *Case Odalisque Painting – Paul Rosenberg Heirs and Seattle Art Museum*. ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/odalisque-painting-2013-paul-rosenberg-heirs-and-seattle-art-museum>
- 4) Chechi,A. Velioglu, Renold, E. M. *Case 14 Artworks – Malewicz Heirs and City of Amsterdam*.ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/14-paintings-2013-malewicz-heirs-and-city-of-amsterdam>
- 5) Contel,R. Soldan,G. Chechi,A. *Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum*. ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/case-portrait-of-wally-2013-united-states-and-estate-of-lea-bondi-and-leopold-museum>
- 6) Velioglu,E, Bandle,A.L. Chechi,A Renold,M.A. *Case Three Nok and Sokoto Sculptures – Nigeria and France*. ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021) <https://plone.unige.ch/art-adr/cases-affaires/case-chagall-gouache-2013-solomon-r-guggenheim-foundation-and-lubel>

- 7) Velioglu,E, Bandle,A.L. Chechi,A Renold,M.A., *Case Khmer Statue – Cambodia and Sotheby’s and the United States*, ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021)  
<https://plone.unige.ch/art-adr/cases-affaires/khmer-statue-2013-cambodia-and-sotheby2019s-and-the-united-states>
- 8) Wallace A.,Chechi A.,Renold M.A. (2013), *Case Chagall Gouache – Solomon R. Guggenheim Foundation and Lubell* . ArThemis, Art-Law Centre, University of Geneva. Last visited (13/1/2021)  
<https://plone.unige.ch/art-adr/cases-affaires/case-chagall-gouache-2013-solomon-r-guggenheim-foundation-and-lubell>

#### **I) Conferences and Symposiums**

- 1) Pell,O.C. (1999) *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted during World War II*,,1999 Symposium Theft Of Art During World War H: Its Legal And Ethical Consequences, DePaul Journal of Art, Tech. & Intellectual Property ,10(1).
- 2) Stamatoudi, I. (2009). *Mediation and cultural diplomacy, Return of cultural objects*:. The Athens conference , Athens, 2009 UNESCO Publishing and Blackwell Publishing Ltd.